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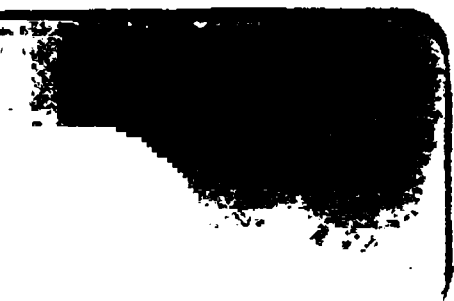
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*L. B. Foster*

**AN ANALYSIS**

**OF THE**

**PRINCIPLES OF EQUITY PLEADING**

**CONTAINING A COMPENDIUM OF THE HIGH COURT OF  
CHANCERY, AND THE FOUNDATION OF ITS  
RULES, TOGETHER WITH**

**AN ILLUSTRATION OF THE ANALOGY**

**BETWEEN**

**PLEADINGS AT COMMON LAW AND IN EQUITY.**

**BY D. G. LUBE, Esq., OF LINCOLN'S INN,  
BARRISTER AT LAW.**

**WITH AMERICAN SUPPLEMENT,**

**CONTAINING**

**EQUITY RULES AND FORMS.**

**COMPILED BY  
STEWART RAPALJE.**

**SAN FRANCISCO:  
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TO A. R. BLAKE, ESQ.

MY DEAR SIR:

It gives me great pleasure to have an opportunity of testifying my sense of the kindness I experienced, as well as the instruction I derived from you, as one of your pupils; and I inscribe to you the following sheets.

I remain, my dear Sir,

Your faithful and obliged friend,

D. G. LUBE.



**This edition is enlarged by the addition of the Rules in Equity promulgated by the Supreme Court of the United States, and a collection of Forms designated as American to distinguish them from those in the original work.**

**STEWART RAPALJE.**



## P R E F A C E .

It has long been a subject of reproach that the study of the law has degenerated from a liberal and scientific pursuit into a mere mechanical process of acquiring forms by dint of manual labor at the desk. How far this general censure on the profession may be just, we will not now stop to inquire ; but thus much we may be permitted to observe, that they who would confine the education of a lawyer to mere books, without affording the student the advantages to be derived from the practice of an office ; and those who, on the other hand, recommend to have the pupil immersed in all the details of business, without a previous competent knowledge of the theory, would equally pursue a system erroneous and unprofitable.

Precision of language is so essential to law proceedings that the change or omission of a word frequently frustrates the object in view ; and hence has arisen the custom of adhering to such forms as experience has determined to be adequate. Without settled forms the most extensive and profound acquaintance with the theory could not secure the practitioner against overlooking, in the hurry of business, some point, or, perhaps, some phrase, important to his case.\* No general course of reading will ever suffice to draw the attention to these minute, but necessary points, the knowledge of which can be derived from practice alone in the office of some experienced guide who, in rectifying the errors and supplying the omissions of the pupil's first efforts, can at the same time inform him of the reasons and rules of law which suggest the propriety of the alteration. This at once serves as an illustration of the theory of the law, and impresses its maxims on the memory, and thus the pupil gradually increases in confi-

\* "Nihil simul inventum est, et perfectum." Co. Litt. 230, a.



dence, until he feels himself competent to enter the lists of the profession, and perform his duty to his client with facility and dispatch.

On the other hand, to plunge the student at once into all the servile drudgery of copying precedents, and literally adhering to forms, the origin and meaning of which is seldom comprehended, and frequently never investigated, is to begin at the wrong end, and is certainly liable to all the animadversions cast upon that illiberal mode of education which degrades one of the noblest and most useful sciences into a narrow and insignificant art, and which has given occasion to all the obloquy from time to time heaped on a profession, thus requiring a very ordinary degree of capacity in the acquisition. A man so trained may be an expert mechanic, but never can be a sound lawyer. Besides, a system of this kind enfeebles and contracts the mind, by binding it down to a timid and obsequious subservance to the very syllable and letter of the form, from which it durst not deviate because ignorant of its utility and effect. Hence the worse than useless prolixity of deeds and other law writings, and the accumulation of unnecessary phraseology everywhere to be met with in the written proceedings. The student who has gone through an ordeal of this kind, previous to his admission to the bar, comes out the "*leguleius cautus atque acutus auceps syllabarum cantor formularum.*" But such a process of initiation is abhorrent to the mind imbued with the taste of classic literature and fresh from the spring of genuine science. The study of the law, however, when properly pursued, is perfectly congenial to the most enlightened intellect, connected as it is with ethics, legislation and rhetoric.

If, as Mr. Locke has affirmed, morality be capable of demonstration, *a fortiori* are the propositions of law, the terms of which are precise and well defined, susceptible of proof. The laws of our country, in fact, form a connected and well digested system of mutually dependent rules, even to its minutest ramifications, and those propositions which, when isolated, appear arbitrary, and sometimes even attended with hardship, if traced to their source, will be discovered as neces-

sarily flowing from some fixed and just principle of legislation. On this principle the following pages attempt to pursue the course of the subject under investigation, up to its fountain head, rather than track the several channels of its divergence; their design is more to point out the origin and *rationale* of the rule, than to hunt after the shades of difference in its application; "*potius fontes expetere quam sectari rivulos.*" By this process of analytical research, the student will sometimes be surprised to find himself landed on a conclusion, by necessary inference, which he may elsewhere meet with as an unsupported dictum, or resting only on the authority of decision. Indeed, it seems to be the prevalent fault of our law tracts that they heap together a multitude of independent rules, for the accuracy of which they are contented to refer to the cases where they occur, without ever once adverting to the grounds of their adoption; and the work is esteemed in proportion to the diligence with which cases are collected, and to the number of references in the margin. This may be abundantly useful, as the plan of a work of consultation, for the benefit of such as are satisfied with point-learning, but cannot be advantageous as an elementary treatise. On the contrary, the attention is distracted and the intellect wearied by the infinity of minute distinctions, and it requires the most patient industry and indefatigable zeal to draw any general conclusion from a multitude of apparently contradictory authorities.

A treatise intended for instruction should do little more than sketch an outline of first principles, carefully discriminating between those propositions which are essential to the understanding of the subject, and those superfluous corollaries which only create embarrassment. The student thus conversant with the elements of his science, will be able to reason *a priori* upon every new case that is presented to him, instead of being obliged to have recourse to analogy, which is oftentimes a fallacious, and at best, a laborious test. He will have less occasion to depend on the exercise of his memory, and at every step that he advances, he will find order and harmony throughout the whole progress of his acquirement. Even the

monotonous routine of the office, in the place of a mindless task of copying forms, is raised by him to intellectual dignity, and he finds, even in that employment, a new and beautiful application of foregone knowledge to present practice.

With this object in view, various books have been written to assist the student, both in conveyancing and special pleading; but nothing of the same kind seems to have been attempted in equity drafting, partly from the notion that there is less nicety required in equity pleadings, which are not so liable to be vitiated by verbal flaws, or errors of form, and partly, perhaps, from an idea that there can be no systematic arrangement of the subject—an opinion that is countenanced by the latitude of indulgence prevalent in equity, and its apparent deviations from the technical subtleties of common law. But that this is a mistake arising from want of sufficient attention to the forms of pleading in equity, will, it is imagined, be apparent from a perusal of the following sheets. We have endeavored to reduce the pleadings in equity into a scientific method, to show their analogy to the pleadings at common law, and of both to the principles of dialectics. Hitherto the pupil has been left without any other guide than a few imperfect precedents, and the scanty observations that are to be found scattered among books of practice; added to which, he has to struggle against a very faulty enumeration of the parts of a bill calculated to mislead and perplex him. The deficiency in this particular has long been sensibly experienced, and the following analysis is an attempt to supply the desideratum.

As the original design was principally for the instruction of pupils, the author thought it right to prefix an epitome of the practice; which, however, from his anxiety not to omit anything which might be of utility, has gradually been raised into an important portion of the work. He trusts, at the same time, that this part of the performance will not be found superfluous; as, not satisfied with seeing that *ita lex scripta est*, he has endeavored throughout to discover the origin and reason of the rule. This attempt is, for the most part, entirely new; and so far as he has been enabled to succeed, is

elucidatory of many points, which otherwise appeared confused and irrelevant. He has carefully abstained from encumbering the memory with any disjointed matter, while he has been diligent not to overlook anything material to a just apprehension of the subject, being desirous of making it a useful as well as convenient compendium. In this point of view, solicitors who wish to acquire a knowledge of the principles of practice, will find it advantageous, at the same time that it is sufficiently copious for the purposes of general reference.

The method adopted in this treatise is as follows:

1st. The general nature and subjects of the jurisdiction of equity analytically deduced.

2d. The objects and end of suits, whether at law or in equity, and the resolution of them into their component parts.

3d. Of a suit in equity in particular, containing a compendium of the practice, from the filing of the bill to the final decree, together with the incidental proceedings.

4th. An analytical treatise of pleading in general, showing the analogy between pleadings in equity and those at common law, when traced to first principles, with a scientific arrangement, which will be found equally useful to common law students.

5th. Instructions for drawing each of the pleadings in equity in their order, with some general rules and observations.

6th. And lastly, to the whole is added an Appendix of useful common forms.

The author ventures to hope that a previous acquaintance with the present work would materially abridge both the labor and duration of the pupil's service in the equity draftsman's office; and as such, he recommends it to those young friends who are destined for that branch of the profession. He also suggests the propriety of not hastening too cursorily over the subject, as many parts of it may appear at first somewhat difficult and abstruse. The pupil should advance cautiously, secure of understanding previous points, before he presses on to their deducibles, and proceed always *a notioribus ad minus nota*.

With this advice, the author takes his leave—concluding with the exhortation of Cicero to his friends—“*Quamobrem pergitte, ut facitis, adolescentis; atque in id studium, in quo estis, incumbite, ut et vobis honori, et amicis utilitati, et rei-publicæ emolumento esse possitis,*”\*

\* Cic. de Oratore, Lib. 2.

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# ANALYSIS

## OF THE

# PRINCIPLES OF EQUITY PLEADING.

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### CHAPTER I.

#### **Of the Nature and Subjects of the Jurisdiction of Equity.**

**1.** The Practice of Equity Drafting consists in drawing the various pleadings which occur in the course of a suit in Chancery, in a technical form, and with apt and proper words, so as to assert the claims, or to defend the rights of the several parties concerned.

The design of the present treatise being to assist the pupil at his first entrance into the pleader's office, in acquiring and comprehending the method which long practice has settled, of drawing these pleadings, our business is principally with the manner and form—for the matter and substance, and the system of rules deduced therefrom, we must refer the student to the various digests and works on equity. For the better understanding, however, of this part of the subject, it will be necessary to have previously a general idea of the nature and subjects of the jurisdiction of equity. Next, we shall take a brief review of the progress of a suit in the Court of Chancery, in order to trace the several pleadings, from the bill to the final decree, and herein we shall consider the parties complainant and defendant. Lastly, we shall examine the frame and structure of each pleading separately, and as it arises,

2. Law is founded on relations, for these necessarily produce reciprocal duties, which it is the end of law to enforce; and the subtraction of any of these duties is an injury, for which the law professes to provide a remedy. Thus, the relative situation of magistrate and people begets the duties of protection and allegiance. So of the relations of parent and child, husband and wife, master and servant, neighbor and neighbor, etc. But by far the most numerous class has arisen from the right of acquiring and transmitting property, as the relations between landlord and tenant, mortgagor and mortgagee, *cestui que trust* and trustee, executor and legatee, and the other various positions in which persons stand with respect to each other, who have either an immediate or derivative interest in the same matter of property. And it is not without reason, that the attention of the student is called to this point, because the process which the mind should use in all cases of law is, first, to have a clear and accurate view of the nature of the relation subsisting between the parties; next, to consider the duties which flow from it; thirdly, to have in mind the breach of what duty has constituted the injury complained of; and lastly, to seek for the remedy which the constitutions of the country provide, and the manner of enforcing it.

Now, as refinement and commerce have introduced a great variety of complex relations, which could not have been originally contemplated, it follows that many duties springing from these new situations exist, the performance of which cannot be enforced by the ancient and common law, either because it gives no relief, or that in the administration of the remedy it is rendered ineffectual by the strictness of its rules. At this point, therefore, equity interposes and assumes a jurisdiction to prevent the ends of justice from being frustrated.

From what has been said above, it is obvious that the jurisdiction of equity results from the inadequacy of ordinary courts of justice to afford relief in *particular cases*, and hence we arrive at a general view of its nature and extent, such *particular cases* being within the peculiar province of equity. Again, if we consider wherein the deficiency in the courts of

common law consists, we shall obtain a still nearer view and be enabled to classify the *particular cases* cognizable in chancery under distinct heads. As has been already stated, the defect of common law courts is two-fold—either, first, where there is no remedy provided, or, second, where it is rendered inapplicable and cannot be obtained by the ordinary rules. Again, this deficiency may arise in either of three ways—first, from the method of proof used by the ordinary courts; second, their mode of trial; or, lastly, the measure of relief afforded by them.

3. As to the first, namely, the method of proof used by the ordinary courts: At common law the plaintiff is compelled to make out the whole of his case satisfactorily, either by written documents or by the testimony of *indifferent* persons upon oath. But cases frequently occur where the plaintiff, though having the right, must be defeated at law, either because material documents have been lost, or that the facts necessary to substantiate his case are known only to the parties interested in the suit. Under these circumstances a court of equity comes to his aid, and corrects the deficiency by obliging the defendants to make a *discovery upon oath*, which, as the student will see by and by when we come to treat of Answers, is the usual proceeding of this court. To this head, therefore, we are to refer the *first class of particular cases* cognizable in equity; and they are either, first, matters of account, such as the administration of personal assets, tithes, partnership transactions, mercantile accounts, and those of bailiffs, receivers, agents, factors, etc., etc.; or, secondly, frauds, under which title we range all matters binding in conscience, lying within the private knowledge of the parties, judgments obtained by fraud and concealment, etc. The student will observe that in all the cases here enumerated equity only exercises a concurrent jurisdiction with the courts of common law, the remedy being there defined, but rendered abortive by the inadequacy of the process for obtaining it; and any matter by these means once coming within its cognizance, it goes on to decree relief in order to avoid the expense and delay of litigation in two separate courts, with the exception



of those cases where discovery is sought expressly in aid of an action at law already commenced.

4. Secondly. As to the deficiency in the mode of trial at common law: In the ordinary courts, all the witnesses are examined *viva voce*; in this court their depositions are taken in writing, of which we shall speak more at large when we come to the title Interrogatories. Wherever, therefore, from the nature of the case, the witnesses cannot in civil causes be examined *viva voce*, chancery assumes a jurisdiction in aid of the other courts; and this constitutes the *second class of particular cases*.

5. Thirdly and lastly. Where the measure of relief provided by the other courts of judicature is inadequate to fulfill the ends of justice, equity interposes and gives a specific remedy; and the class of cases which comes within this head constitutes the *third series of particular cases* cognizable in equity. These are, amongst others, the specific performance of executory agreements, the immediate prevention of waste or other irreparable injuries, the restraint of endless litigation, setting aside fraudulent deeds, decreeing reconveyances, directing absolute conveyances to stand as securities only, decreeing a sale of lands to discharge incumbrances, debts, etc.; and, lastly, the construction of real and personal securities as mortgages, bonds, etc., and the execution of trusts.

6. Besides the cases above enumerated, the Lord Chancellor is entrusted, *virtute officii*, with, First, the guardianship of minors. Secondly, the custody of lunatics and idiots. Thirdly, the care and superintendence of charities; and Fourthly, the management of bankruptcy cases. These together include all the matters which can be the subject of a bill in chancery, and the student will do well to consider to which of the above classes the matter which he has in hand is reducible, as thereby he will have a more distinct perception of the scope and object of the bill to be drawn, whether it be for a discovery from the defendant, for the examination of witnesses, or for a specific remedy; and lastly, for all or some of these purposes com-

bined. We have omitted saying anything here of the ordinary jurisdiction of the Court of Chancery, as our business is solely with pleadings in *Equity* (a).

It is obvious, from this general outline of the jurisdiction of equity, that the pupil should be previously acquainted with the form and extent of the remedies supplied in ordinary cases by the common law, in order that he may know where the province of equity commences.

(a) Vide Black. Comm. Vol. 3, c. 27, from which the above analytical arrangement has been chiefly taken.

## CHAPTER II.

## Of Suits in General.

7. A suit is the form of application to the judicial power of the State, for the redress of injuries alleged to be sustained. It seeks, in the first instance, the judgment of the law on a matter of right in dispute between the parties. The right being ascertained, it in the next place demands the interference of the supreme authority, or sovereign power, to put the injured party in possession of his right, or to enforce compensation in lieu. The subject matter, therefore, of all suits, is the rights of the individuals concerned, and the end is the judgment and sanction of the law.

A suit consists of the *Process*, the *Pleadings*, the *Proofs*, the *Trial*, *Judgment*, and *Execution*; to which may be added the incidental or *interlocutory* proceedings which may arise during its progress.

The *Process* is the means by which the party complained against is brought into court to answer to the matters laid to his charge.

The *Pleadings* are the allegations and answers of the respective parties, which are carried on until the true and simple point of dispute (whether matter of right or matter of fact) is extracted, being an assertion on one side, met by a denial on the other, from which follows the appeal to the proper tribunal.

The *Proofs* are the evidences in support of the question of fact.

The *Trial* is the mode of determining the question of fact.

The *Judgment* is the deduction of law drawn from the pleadings, as admitted to be true by the adverse party, or established by proof.

*Execution* is the sanction of the law, enforced by its ministerial officers, who thus give effect to the judgment pronounced.

8. From what is said above, it may be collected that the judicial authority is an emanation from the sovereignty, wheresoever that resides, and, hence, with us the courts of judicature are called the King's Courts, and all original writs which give them jurisdiction are tested in the king's name. In reality, the original of all government, and therefore the first duty of that established in any country, no matter of what form, is the protection of the weak against the violence of the strong. (a) On this account the demand of justice is always made to the supreme power, whose principal office is to redress injuries and punish crime. In despotic governments the prince usually, at least in the early stages of civilization, administers justice in person, and, as he is guided by no law, it is generally dispensed in a summary way, according to his discretion or caprice. (b) It next naturally follows that, finding this both a troublesome and invidious office, he delegates his power into other hands; and thus judges are appointed early in the progress of civilization, and although at first they are possessed of the same arbitrary authority which they have derived from the prince, yet it is checked and restrained by the power of appeal to the sovereign himself. It is from this that liberty takes its first rise, being nursed and protected in the "*cunabula legis*." If it happen that a just and wise man be chosen to fulfil this important trust, his decisions are regarded as laws, and followed as precedents from which it would be dangerous for his successors to depart; and thus is another restraint imposed upon the arbitrary power of the judge, and in this manner liberty makes one step further in advance.

This is the natural order of things. Laws at first generally arise *pro re nata*, and it is only by degrees that they become

(a) *Officium erat imperare, non regnum.*—Sen. Epist. 91.

(b) *Populus nullis legibus tenebatur; arbitria principum pro legibus erant.*—Justin. Hist. Lib. 1.

Eq. PL.—2.

established into a permanent rule of conduct. Until such, however, takes place, there can be no perfect security. Courts of justice are the immediate consequence of established laws, for these are erected to decide controversies according to the *declared rules of law*, and to administer the appropriate *remedy provided* for the particular case. This view points out a division of the laws into two great branches—the one declarative of abstract rights, the other, of the practical form and mode of redress. The perfection of law is to have a clear and definite remedy for every injury which can be sustained, *nullus recedat a curia sine remedio*; and it is at this flourishing period of civil polity, when the laws are fixed and property secure, that we are now inquiring into the method employed for obtaining and applying the remedy.

9. The mode of obtaining the remedy is by *suit*: and for the sake of regularity every court lays down a system of rules and proceedings called the *practice* of the court, the knowledge of which forms a very considerable branch of the study of the law. The practice of the court of chancery will be the subject of the whole of the first part of this treatise. At present we confine ourselves to a general consideration of those proceedings which are essential to every suit, and therefore common to all courts. As, for the sake of justice, everything must be well weighed and considered before the court will pronounce a definite opinion upon the rights of the parties, both parties must be heard, and the court must know what the person complained against has to say in his own behalf before the executive functions of the court will be exercised against him. The first step, therefore, upon complaint being made, is to produce the attendance of the wrong-doer, in order that he may justify or deny the conduct attributed to him, and that he may show to the court some reason, if he can, why he should not be compelled to make the restitution demanded. The summons to attend, or the compulsory means resorted to when the party will not appear voluntarily, is denominated the process of the court, and is part of the ministerial power entrusted to it and subservient to its directions. When the

parties are before the court, the injured person states his complaint, and the other answers and excuses himself, to which the former replies; and so on until the altercation arrives at a point where one party denies the *right* claimed, or the *fact* insisted upon by the other side, from which arises the appeal to the court for its decision. These disputations are what are called the *pleadings* in a suit, which are with us carried on in writing, though formerly delivered *ore tenus* at the bar, and noted down by the prothonotaries to avoid evasion and a shifting of ground, which is termed a *departure*. Thus the appeal to the court is either on a question of right or a matter of fact, or both. Where laws have been established declarative of abstract rights, the first point must be decided according to the rule of law. (a) If there be no law or custom prevailing which meets the case, then the decision must be left *arbitrio boni viri*, who determines the controversy according to reason and conscience and the dictates of natural justice. This is the meaning of equity, as distinguished from law, whether it be administered by the same or a separate tribunal. When the dispute turns upon some point of fact, the truth or falsehood of the fact must be ascertained by *proof*. The only rational mode of proof is, by the testimony of witnesses and documentary evidence, or by putting the accused party's conscience to the test of an oath. Of these, the last is the weakest, and therefore it is seldom used alone. The trial is the manner of weighing and examining the evidence, so as to elicit the truth: thus, witnesses may be examined *viva voce*, or their testimony may be delivered in written depositions; so the same persons may be the judges both of the law and the fact, or there may be different tribunals for each of these questions, as in our common law courts the judges decide questions of law, the jury matters of fact. After the rights of the suitors have been ascertained, and the facts proved and established by trial, next follows the solemn *judgment* of the law,

(a) The decision of the judge upon a mere abstract right or point of law, which is the same as our judgment on demurrer, was called by the Romans *jus dicere*, to distinguish it from the final sentence, which was *judicare*. *Vide P. Manut. de Legibus*, 826.

which is an adjudication of the remedy prescribed for the particular injury sustained. But if the existing laws have not provided suitable redress, then again equity assumes the authority and affords relief, according to the circumstances of the case. If, either on the determination of the question of right or of fact, it appears that there is no just cause of complaint, then the judgment is in favor of the party accused, and he is allowed to depart without further molestation. Lastly, comes the execution of the sentence of the court, being the end for which all suits are instituted; by which the remedy dictated by the court, or provided by the laws, is enforced under the authority of the supreme power of the state; and this is the final sanction, without which, laws, however just and salutary in their enactments, would yet be unavailing and inoperative. In the progress of a suit it may become necessary for the court to give various directions connected with the proceedings before it. These are the interlocutory orders, which, however, determine no right between the parties, but are merely subservient to the due administration of justice, and subordinate to the final judgment. Such orders are therefore merely discretionary, being granted according to circumstances, upon the application of the parties, though in some instances grown, by frequency and custom, into matters of course. But this is part of the learning of the practice of the courts.

These incidents and these observations are alike applicable to all suits, in all countries, and at all times; for however dissimilar the forms of proceeding in each may be, yet they are all built upon the same foundation and constructed on the same plan. The materials and the style of architecture may be different, but the design of the edifice is in all cases the same.

10. In illustration of this remark, it will be curious, and not perhaps altogether unuseful, to trace the affinity between the proceedings in civil causes under the old Roman Law, and

that which prevails in this country (a). The Prætor Urbanus was the judge who presided in the court, and who decided on the pleadings and matters of law arising out of them, as our demurrers are argued before the court. The *actor* or plaintiff first proceeded in *jus reum vocare*, equivalent to the original writ with us, and the process founded thereon; for if the *reus* or defendant disobeyed the summons, he was dragged to justice *ob torto collo*. The next step was *edere actionem*, similar to filing a declaration, and then came the *postulatio actionis*, similar to a day being given to the parties. If necessary, the plaintiff *vadabatur reum*, like our bail above. Bail was also given below, according to the common maxim. *In jus vocatus aut eat, aut satisfacet*. At this stage, the controversy was frequently terminated, either *transactione*, like our judgment of *nonpros*, or *pacto*, which resembled our imparlance. If on the day appointed, both parties appeared, they termed it *se stetit*; if not, judgment went by default. A similar rule holds with us, if the parties neglect to plead in time, which is equivalent to non-appearance at the day given; for anciently, as has been already remarked, our pleadings were delivered *ore tenus* in court, and it is so entered on the record-roll at this day. When the parties pleaded, they were said *litem intendere*, which was performed in a set form of words, varying according to the nature of the action, and concluding with a prayer of judgment, which was to be allowed *judices* or *centumviri*, to hear and decide the controversy. So the argument of our pleadings is carried on before the court, and the conclusions or issue, if on a matter of fact, is to the country, i. e. to be allowed twelve good and lawful men as judges to try the issue according to the evidence. In the Roman law, as with us, the *centumviri*, or jury, always took a solemn oath to be impartial. They were chosen three out of each tribe, so that their number amounted to five more than their name imported. When the *judices* were awarded by the court, then commenced the

(a) *Vide Sigon. de Judiciis*. See also what is said by Sir William Jones on this subject, in his prefatory discourse to the speeches of Isæus: and the analogy which he there draws between the Athenian and the Civil Law.



*d'sceptatio causæ* before them, managed by the lawyers on both sides, similar to the trial at *nisi prius*. The lawyers who conducted the business were of two classes, *procuratores* and *advocati*, analogous to attorneys and barristers with us. These had not permission to practice until their names were entered in the matriculation book of the *forum*, a custom perfectly consonant to the formality of being called to the bar, after a certain service in one of the inns of court, which is equivalent to matriculation. Nor were they allowed to plead in a particular cause, unless retained by one of the parties, on receiving a fee called *mandatum*. The analogy in this respect to our retainer will be immediately recognized. In like manner the Romans had a proceeding, termed *in integrum restitutio*, equivalent to a new trial; *addictio*, which was the same as our *ca. sa. judicium calumniæ*, like our costs *pro falso clamore*. In some cases the *estimatio litis*, or damages and *judicium falsi*, similar to our ancient and now obsolete method of proceeding against the jury by attainder.

It was not, however, until after the code of Roman laws had gained a high degree of excellence, that these forms of judicial proceedings were arranged and defined. In the rude and early period of the Roman commonwealth, after the expulsion of the kings, and the consequent abrogation of the *jus Papirianum*, the judicial proceedings rested wholly on the discretion and authority of the consuls and other chief magistrates. (a) The inconvenience of this system was soon felt, and commissioners were sent into Greece to make a collection of the best laws for the service of their country, from which were compiled the Laws of the Twelve Tables, on which Cicero passes so high an encomium in his first book *de Oratore*. (b) On these were founded numerous commentaries and interpreta-

(a) *Initio civitatis Romanæ populus sine certa lege, sine certo jure, agere instituit; omniaque manu regis gubernabantur. Pomp. de Orig. Jur. 1, 2.*

(b) *Fremant, omnes licet, dicam quod sentio: bibliothecarum mehercule omnium philosophorum unus mihi videtur xii tabularum libellus, si quis legum fontes et capita viderit, et auctoritatis pondere et utilitatis ubertate superare. Cic. de Oratori, lib. 1.*

tions, the whole body of which, taken together, formed the *jus civile*, or what may be fairly enough termed the *common law*. The necessity of establishing settled forms of proceeding next produced the system of rules called *actiones legis*, or the laws and regulations relating to the practice of the courts. But even so late as the time of Sylla the Dictator, these were still subject to continual fluctuations, for the Prætors, at their entrance into office, always issued an edict, modelling the practice according to their discretion, during the time they presided in the court, until the *Lex Cornelia* ordained that the same form should always be used in judicial proceedings, in order to preserve a constant and regular course of justice. These laws were from time to time increased, as occasion demanded, by the *senatus consulta* and *plebiscita*, which bear an analogy to our statute law: added to which were the edicts of the Prætors, called the *jus honorarium*, similar to those decisions of eminent judges, which are with us acknowledged as precedents, and have obtained the force of laws. Lastly, when the government of Rome became despotic, under the Cæsars, the will of the prince, or, as it was impiously termed, *jussio divina*, had the authority of law, with the name of *principalis constitutio*. Happily for us, we have no parallel for this in our political institutions. (a) In the reign of the Emperor Justinian, these laws and the writings upon them, had grown to such an enormous bulk, that there were then extant two thousand distinct volumes on the subject. They were, by his orders, revised and reduced to the four celebrated volumes which go under his name.

The brief sketch which we have thus attempted to give of the rise and progress of the Roman system of jurisprudence, is with a view to illustrate the observations which have been made in the early part of this chapter. (b) We shall now

(a) The doctrine of the *divine right* of legitimacy has not yet found its way into this country.

(b) For further illustration on this point, we refer the curious student to Selden's *Janus Anglorum*, where he will find the origin of our customs traced to their source, and some account of the laws and religion of the ancient Druids.

proceed to give a detailed account of the nature of a suit to the *extraordinary* jurisdiction of the High Court of Chancery in England.

## CHAPTER III.

## The Commencement of a Suit in Chancery.

## SECTION I.

*Of the Nature and Several Kinds of Bill—and of the Parties thereto.*

**11.** A suit in chancery is commenced by the party aggrieved preferring a petition in writing, which is called a bill, to the person or persons for the time being having the custody of the great seals of Great Britain; or to the king, in his High Court of Chancery, in case the person holding the seals is a party, or the seals are in the king's hands.

The petitioner, who technically styles himself "your orator," first sets forth in his bill the nature of the relation subsisting between him and the party defendant, therein deducing his own title. He next states the injury complained of, adding such circumstances, by way of allegation (in pleading, termed "charges"), as tend to corroborate his statement, or anticipate and controvert the claims, or pretended claims of his adversary; and finally prays the court to grant a writ of *subpœna* to compel the defendant to appear and answer the several positions of the bill (which are put into the shape of distinct interrogatories), in order that the court may be enabled to decree such relief as the nature of the case may require, and which relief is also specifically prayed for. If the injury complained of be immediate, and of such a nature as that it would become irremediable by delay, the petitioner, besides the writ of *subpœna*, applies for such other writ or writs as may meet the exigency of his case—such as the writ of *injunction*, or *ne exeat regno*.

12. All bills are *bills of discovery*, as appears from what has been said concerning the nature of them generally; but some are peculiarly termed such, which do not seek any decree from the court, but require its aid only in support of an action at law, or to perpetuate the testimony of witnesses upon a matter which might thereafter be the subject of dispute. If any new matter has arisen subsequent to the filing of the bill, whereby the original suit becomes defective and no regular decree can be made, a new bill, containing the supplemental matter, and reciting the former bill, must be filed, and is denominated a *supplemental bill*. If the supplemental matter be such as would cause an abatement of the suit, as the death or change of interest of any of the principal parties, the new bill is styled a *bill of revivor*, and must state upon whom the interest has devolved, and pray that the suit may be revived and stand in the same plight and condition with respect to the new party as before the abatement occurred. In some instances the new bill will have the double character both of revivor and supplement. (a) *The bill of interpleader* is exhibited by one who owes a debt, or duty, claimed by different persons in separate and distinct interests; that the parties claiming may interplead together, so that the court may pronounce to whom the thing claimed belongs, and the person filing the bill may be safe in the payment thereof. To this bill an affidavit is always annexed, that the complainant does not collude with either of the parties. (b) A *cross bill*, which is one filed on the part of the defendant, will be noticed further on, as will also the *bill of review*.

13. In general, all bodies politic or corporate may exhibit by themselves a bill in this court, except *infants, feme coverts, and idiots or lunatics*. When an *infant* claims a right, or suffers an injury, on account of which it is necessary to resort to the jurisdiction of chancery, the court will not permit any person, *without the infant's consent*, to institute in his behalf; and such person generally being the nearest relation, or indi-

(a) See further as to these bills; *post*, Part 1, cap. 16.

(b) *Vide post*, cap. 9, sec. 3.

vidual most interested for him, is entitled the *prochein ami*; (a) but he is liable to costs of suit if determined against him. (b) And if an infant be sued, the court will appoint a guardian "*ad litem*."

A *feme covert* must sue and be sued, jointly with her husband, unless she claims a right in opposition to him, in which case her *prochein ami*, who is to be a responsible person, exhibits a bill in her behalf, (c) but it must always be *with her consent*. (d) In some cases, as where she cannot in conscience consent to the husband's answer, (e) she will be permitted, on an *order* obtained for that purpose, (f) to defend the suit separately; and even without such *order*, if the suit be at the instance of the husband. (g) A woman whose husband is an exile, alien enemy, has abjured the realm, is in all respects considered as a *feme sole*. (h)

*Idiots and lunatics* carry on suits by their committees, (i) and in some instances the attorney general will exhibit an information on their behalf. (j) And the committee of the estate of an idiot or lunatic, must be made defendant with the person whose property is under his care. (k)

**14.** All persons whatever may be sued in chancery, except the king and queen. In matters which impeach a *vested* title in the crown, the application must be to the king by petition of right; but in case of public trust, or where its interest is only incidentally affected, the attorney general is made a party to a suit in chancery, with respect to such interest. (l)

- (a) Prec. in Ch. 376. 1 Atk. 570.
- (b) Mos. 47, 186. 2 Eq. Ca. Ab. 238.
- (c) 2 Ves. 452.
- (d) Prec. in Cha. 376.
- (e) 2 Atk. 49.
- (f) Mitf. 83.
- (g) 3 Atk. 478.
- (h) Mitf. 84 and 2 Vern. 10.
- (i) Eq. Ca. Ab. 279.
- (j) 1 Cha. Ca. 112, 153.
- (k) 1 Cha. Ca. 19.
- (l) Mitf. 3d ed. 24. 1 P. Wms. 445.

The general rule is, that all persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties if within the jurisdiction of the court. (a) Thus, if two or more have a joint interest, they must be all parties. So if two or more be liable to a demand, you cannot prove against one alone. So all executors, trustees, or their representatives, are to be made parties. (b) But this general rule holds with the restriction that no one need be made a party against whom, if brought to a hearing, the complainant can have no decree. (c) Thus in general, a residuary legatee need not be made a party (d); and for the same reason, in a bill brought by the creditors of a bankrupt against the assignees, under the commission, the bankrupt himself need not be made a party. (e)

Of these several parties to the suit, some have an immediate or proximate relation through the subject of litigation; others have only an incidental or derivative interest therein, and hence they may be divided into *principal* and *collateral*. And this is a distinction useful to be kept in view, for the clear perception of the scope of the bill, and for determining who are the necessary parties to the suit.

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## SECTION II.

*Of Filing the Bill, and the Defendant's Appearance; and herein of the Process of the Court.*

**15.** All the office business relative to the pleadings, etc., in this court, is transacted by six principal officers, styled six-clerks, who have each under them, as assistants, several subordinate clerks, called clerks in court. Now, after the bill is drawn and signed by counsel, it is engrossed on parchment, and carried

(a) Prec. in Cha. 83. 2 Atk. 510. 1 Mer. 262.

(b) Hinde, 12.

(c) 5 P. Wms. 310, in note.

(d) 1 Bro. C. C. 303. 1 Madd. Rep. 448.

(e) Hinde, 13, and 2 Vern. 32, therein cited. 1 Ves. and Beames, 550. See further, as to the necessary parties, Part II, cap. 3, sect. 1.

to some one of the clerks in court, who, having entered it in his book, delivers it to his immediate superior, the six-clerk, to be filed; and then it is said to be of record, and bears date from the day on which it is brought into the office. (a) When the bill is filed, the party is regularly entitled to have a *subpœna*, which he obtains upon application to the proper office; but by the statutes 4 and 5 Ann., c. 16, no *subpœna* or other process for appearance shall issue till after the bill is filed with the proper officer, except in cases of bills for injunction to stay waste or stay suits at law commenced.

16. The *subpœna* in chancery is a mandatory writ or process issuing under the general seal, directed to a party summoning him to appear—under a penalty—*subpœna centum librarum*; to answer to such things as are objected against him, either on any day certain within the term, which is the *ordinary* return, or during the vacation immediately: but this latter, which is an *extraordinary* return, will be granted only on petition or motion, and an affidavit, stating that the defendant lives within ten miles of town. When the party has been regularly served with this writ, he must put in his appearance if he reside within twenty miles of London, in four days at least, exclusive of the service of the writ. If he reside above twenty miles from London, it is then termed a country cause, and the defendant has eight days to put in his appearance. (b) But if he refuses or neglects so to do, he is in contempt, and further process will be awarded against him. Although it is beside the purpose of the present treatise to enter into a minute detail of the process necessary to compel the attendance of the defendant, yet, in giving an outline of the progress of a suit, it will be proper, in order to have a consistent view of the whole, briefly to enumerate the compulsory steps used to bring the party into court.

17. When, therefore, the defendant has incurred a contempt by not appearing within the time limited by the rules of the court, an *attachment* will issue against him. This is a writ

(a) Beames' Ord. in Chan. 168.

(b) Beames' Ord. in Chan. 169.

Eq. PL.—4.



directed to the sheriff, or other ministerial officer of the county where the defendant generally resides, commanding him to attach the party in contempt, and have him before the court on a certain day, to answer for the contempt, as well as all other charges which may be brought against him. It must be returnable in term, and there should regularly be fifteen days between the *teste* and return of this and all subsequent writs, in order to proceed to a *sequestration*, or take a bill "*pro confesso*;" otherwise, if the defendant live within ten miles of town, an order may be obtained by motion or petition, to have them returnable *immediatae*. (a)

18. Upon this writ the sheriff returns either "*cepi corpus*," or, if the party be not taken, "*non est inventus*." In the first case, it is usual to move for a messenger, who is an officer of the court, subordinate to the sergent-at-arms, to take the prisoner into his custody and remove him to the fleet, which is the prison of this court. A *habeas corpus* is next had to produce him in court, where he is admonished to appear and answer, and a day is assigned him for that purpose. If he is obstinate in refusing so to do, an *alias habeas corpus* is issued; then a *pluries habeas corpus*, and, finally, an *alias pluries habeas corpus*. If the defendant still continues in contempt, and appearance will then be entered for him, pursuant to the stat. 5 Geo. II, c. 25; and the clerk in court attending with the record of the complainant's bill, the matter thereof will be decreed to be taken "*pro confesso*" against the defendant.

If, when the sheriff returns "*cepi corpus*," the party had been already in custody, a *habeas corpus cum causis* goes to the keeper of the prison, or warden of the fleet, requiring them to specify *the causes* of such previous commitment. The return of these writs of *habeas corpus* is always on a day certain, either in or out of term, and there is no limited time between their *teste* and return. (b)

In the other case, when the sheriff returns *non est inventus*, an attachment with *proclamations* is next ordered, command-

(a) Hinde, 100.

(b) Hinde, 111.

ing him to issue a proclamation, calling upon the defendant to surrender upon his *allegiance*, and otherwise to take him if he can be found.

If he still holds out, and *non est inventus* be again returned, the next process is a *commission of rebellion*. The commissioners to whom this writ is directed are usually nominated by the complainant, and can justify breaking open doors (a) in executing its commands, which are to take the person of the defendant wherever he may be found,

Each of the above steps is taken, as of course, upon the return of the process immediately preceding; but the two remaining ones can only be had on application to the court by motion, (b) because, being the acts of the court itself, it will not order them without being certified of their propriety. Being informed, therefore, of the inefficiency of the former process, it will next send its immediate officer, the *sergeant-at-arms*, in search of the party, and on his certifying that he is not to be found, it next proceeds to a

19. *Sequestration*, which is the last process to compel obedience. Hitherto the proceedings were *in personam*, merely; but this last is *in rem*, and is a commission under the great seal, directed usually to four persons named by the complaint, or sometimes to the sheriff, empowering him, or any *two or more* of the commissioners, to enter upon and possess the real and personal estate of the defendant (or some particular part and parcel of his lands), and to take, receive, and sequester the rents, issues and profits thereof, and keep the same in their hands, to be disposed of at the discretion of the court, until the party shall have performed the matter for refusing or neglecting which he is in contempt. A sequestration can only be obtained upon motion, and not upon petition. (c)

If a third person claim the *real estate* under a title paramount to the sequestration, he shall not be compelled to file a

(a) Gilb. For. Rom. 76.

(b) Gilb. For. Rom. 77, 81, 82.

(c) Beames' Ord. Cha. 215; *et vide infra*. p. 55 *et seq.*

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bill, but may contest such title in a summary way, and move by his counsel to be examined touching it before a master. This is termed an examination *pro interesse suo*. The complainant exhibits interrogatories to the party, and proof having been gone into, if necessary, the master reports accordingly, and thereupon the court pronounces its judgment; and if it appears that his claim be well founded, orders the sequestration to be discharged as against him. (a)

A sequestration commonly issues against both the personal estate and the rents and profits of the real estate, which are seized by the sequestrators and kept in their possession, but cannot be sold except by the decree of the court; for this process is only to form the foundation of taking the bill *pro confesso*. (b)

If the suit be for land, the court sometimes orders the profits to be delivered to the complainant, and will frequently even grant him an injunction to put him in possession until further order. (c)

20. This is the usual course when the defendant obstinately holds out and refuses to abide the orders of the court *after appearance entered*. If the defendant, however, did not appear, or was not taken on process, the complainant formerly had no means of redress; to remedy which the 5th Geo. II, c. 25, was enacted, which directs that if a defendant absconds to avoid being served, upon a positive affidavit of the fact, the court, upon motion, will fix a day for him to appear, which order must be inserted in the Gazette, etc., in pursuance of the act; and if the defendant refuses to appear, upon affidavit thereof, the bill will be taken *pro confesso*. And this act extends to cases where, after appearance, the defendant absconds, so as to avoid being served with subsequent process at any stage of the suit. (d)

(a) Gilb. For. Rom. 80, 81.

(b) Hales v. Shaf's, 3 Bro. C. C. 72. Crawley v. Clarke, *ibid*, 372.

(c) 3 Ves., Jun. 23. Wyatt's Prac. Reg. 386.

(d) Mawer v. Mawer, 1 Cox, 104

Such is the mode by which the Court of Chancery proceeds to enforce obedience to its orders, whether it be to appear to answer or to do any other matter, either before or after the hearing, which the court in its wisdom may direct. The party in contempt may come in at any stage, and upon paying the costs incurred, discharge the process against him. There remains a word or two to be said concerning peers, privileged persons and corporations.

21. With regard to *peers*, *peeresses* and *bishops*, from respect to their dignity, when a bill is filed against any of them, the chancellor always writes a complimentary letter to inform the party of the complaint, and to request his appearance in court: which is entitled a *letter missive*, and is obtained upon petition, as of course. The original letter, with a copy of the petition, and office copy of the bill, must be served personally, or left at the defendant's place of residence. (a) If the letter be not attended to, a *subpœna* issues as in ordinary cases; but the next immediate process is the sequestration, because the privilege of Parliament protects the *person* from arrest. For the same reason, therefore, members of the House of Commons must be proceeded against by sequestration, omitting the intermediate steps, from the *subpœna*. In neither of those cases, however, will the sequestration be granted in the first instance, but eight days are allowed to the party to come in and show cause why the sequestration should not issue. The first application, therefore, is for a *sequestration nisi*, i. e. *unless* the party shall show cause to the contrary; and the order thus obtained being *personally* served upon the party, if within eight days after the service he does not attend, the order will be made absolute.

*Corporations*, being invisible persons, cannot be arrested; and therefore the next process for them, after *subpœna*, is a *distringas*, directed to the sheriff, to distrain their goods and chattels, with an *alias* and a *pluries distringas*, and finally a sequestration. Officers of the court, on default of appearance, are *suspended* until they obey process, or a *sequestration*

(a) Vide 47 Geo. 3, c. 49.

## 42 FILING THE BILL, AND THE DEFENDANT'S APPEARANCE.

*nisi* is awarded against them, which is in the nature of a suspension. (a)

When an *infant* defendant does not appear, an *attachment* issues *pro forma*, but a messenger is always sent to bring him into court, where, if no friend or relation offers to act as his guardian, one of the clerks in court, not towards the cause, will be appointed to act in that behalf. (b)

As has been already stated, when the defendant has been served with a *subpoena* he is to put in his appearance after the return of the writ, which is a *voluntary* appearance; or such appearance may be compulsory by means of the process above described. The manner of entering an appearance is by the defendant's employing or retaining a clerk in court, who leaves a notice in writing with the clerk of the opposite party; after which he takes the bill off the file and enters a note of having done so in the six clerk's book. But if a clerk in court has already appeared for any other defendant to the bill, on application being made to him the bill is obtained and an office copy made therefrom.

(a) Mos. 228.

(b) Hinde. 240.

## CHAPTER IV.

## Of Preparing and Filing the Pleadings on the Part of the Defendant.

**22.** The defendant having perused the bill, is next to answer the distinct interrogatories contained in it, unless he can take *exceptions*, either, first, by showing that there is some reason *apparent on the face of the bill* why he should not be called upon to answer at all, or to some particular part of the bill, which is called a *demurrer*; or, secondly, by stating *some new fact* which would discharge him from the necessity of doing so; and this is termed a *plea*; or, thirdly, he may demur as to part, and answer the remainder, or plead in part and answer in part, or he may plead, answer and demur to distinct parts of the same bill. If a defendant has no interest or concern in the matter in litigation, he puts in a *disclaimer* of all right or title thereto. A bill may likewise be referred to the master, for scandal or impertinence, that the records of the court may not contain anything improper or unnecessary.

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## SECTION I.

*Of the Order for Time.*

**23.** When the defendant resides within the circuit of *twenty* miles from town, it is termed a *town cause*; if beyond that range, a *country cause*. In town causes the defendant has *eight* days allowed him after filing his appearance, to put in his answer or other pleading; but the court will, *as of course*, grant three separate orders for further time, on being applied to by motion or petition for that purpose; the first for a month, the second three weeks, and the third a fortnight; but this last has a condition annexed, that the defendant undertakes to pray no further time. The usual order for

time is to *plead, answer, or demur*, not demurring alone; but if the defendant obtains the order to *answer only*, he will be permitted to put in a plea, (a) which is a special answer, but he will not be allowed to demur, though coupled with an answer; (b) nor can he extend the order for that purpose. (c) If, however, the defendant cannot perfect his answer within the time prescribed by the several orders above mentioned, he may make a further application, stating the circumstances of the case, which the court will grant upon condition that the defendant enter his appearance with the register, as upon an attachment returned, and consent that a sergeant-at-arms should go against him if the time should expire without his having put in an answer. (d)

These orders are to be served upon the complainant's clerk in court, and each successive one ought to be served before the preceding order expires; otherwise, in strictness, the defendant may be attached at the expiration of the time, for want of an answer; but this rarely occurs, for by the courtesy of the office, when the time has elapsed, the defendant's clerk expects to be called upon by the other side for an answer, and to have notice of attachment before any attachment is actually sealed, in order to give his client an opportunity to procure an order for time.

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## SECTION II.

### *Of the Demurrer.*

**24.** When the defense to the bill is by demurrer only, the draft of the demurrer being settled and signed by counsel, a transcript must be engrossed on parchment and delivered to the defendant's clerk in court, to be *filed*. A demurrer, as it

(a) 2 P. Wms. 464. 1 Vern. 275. 3 P. Wms. 80. Mos. 27, and Roberts v. Hartley, 1 Bro. C. C. 56.

(b) Kenrick v. Clayton, 2 Bro. C. C. 214. Contra, Easter v. Weston, 1 Vern. 463.

(c) 1 Ves. & B. 184. Phillips v. Gibbons.

(d) Hinde, 226.

asserts no fact, but relies on matter apparent on the face of the bill, is put in without oath, and without being signed by the party. It is therefore considered that the defendant may, by advice of counsel, upon sight of the bill only, be enabled to demur; and for this reason a demurrer, not coupled with a plea or answer, must be filed within the eight days, as the court never indulges a defendant with time to demur *only*; nor can a demurrer under an order for time be regularly filed, it being the special condition of every such order, that the defendant shall not demur alone. Nor can the strictness of this rule be eluded by answering any immaterial fact or denying combination only: for a demurrer accompanied with such an answer, is not esteemed to be within the terms of the order. [a]

Within eight days after the demurrer is filed, the defendant's clerk in court must leave a note with the register, to have it *entered* for argument, and if it be not *entered* within the limited time, it is overruled of course [b], and the complainant may take out process for costs, and to make a better answer. So if a demurrer be accompanied with a plea or answer, or both, the demurrer and plea must be entered, or they are overruled of course. When the demurrer is entered with the register, either party may, upon application by petition, at the office of the chancellor's secretary, obtain an order to have it set down for hearing; and such order being entered at the register office, a copy thereof is to be served upon the opposite clerk in court, two days at least before the day appointed for hearing, to give time to prepare counsel's briefs. If the demurrer be allowed, the complainant's bill, or such part of it as is demurred to, is dismissed of course, and the defendant is awarded a *subpœna* against him for costs. In case, however, the matter demurred to is a slight mistake which may be rectified by amendment, the court will make a special order for that purpose, instead of allowing the demurrer. [c] If, on the other hand, a demurrer to the whole bill is overruled, the complainant on his part issues an attachment against the de-

[a] 8 Ves. 526. 2 P. Wms. 289. 1 Bro. C. C. 78.

[b] Peames' Ord. Cha. 77.

[c] Mitf. 175. 9 Ves. 221.



fendant for *want* of an answer, and a *subpœna* for costs. But when the demurrer is to part of the bill only, and coupled with an answer to the remainder, after the demurrer overruled, exceptions must be taken to the answer. So, if there be demurrer and plea, exceptions must be filed to the plea, if ordered to stand for an answer. When demurrer to part and answer to the remainder of the bill are put in, the answer cannot be proceeded on until the demurrer has been determined, for until then it cannot be known whether the answer is sufficient. A complainant may amend his bill upon payment of twenty shillings costs, after a demurrer is put in, if it be not set down to be argued; and after it is set down, upon payment of the costs of the demurrer. (a)

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### SECTION III.

#### *Of the Plea.*

**-25.** The same rules hold with regard to the filing, entering, and setting down of pleas for argument, with this difference only: that as pleas state new matter of fact which may be put in issue, they must be *sworn* to, in the manner described in the following section, when treating of answers, except those which merely go to the jurisdiction of the court or the disability of the complainant, or state some matter of record; for these being points not controvertible or easily ascertained, are taken on the authority of counsel. The time allowed for filing pleas necessary to be sworn, is the same with that of answers, above described.

But though a plea should be good in point of law, and be allowed on argument, yet this does not, as in the case of demurrer, terminate the proceedings, for the facts on which it rests may be untrue, and if the complainant has reason to doubt their truth, he may reply to the plea and take issue upon it, and proceed to examine witnesses, as in case of an answer;

[a] Wyatt, Prac. Reg. 68. 1 Dick. 358.

[a] but when he replies to a plea before it comes to be argued, it is always an admission of its validity, as if it had been argued and allowed; and if the defendant prove his plea, the bill must be dismissed at the hearing. So, if the complainant amend his bill before he argues his plea, it is an admission of the goodness of the plea. [b]

When the complainant replies to the plea, whether its validity in law be allowed on argument or admitted by the complainant, the only question which remains is as to the truth of the facts alleged by the plea. Should these be established by proof, the bill must be dismissed at the hearing, since the plea is thus substantiated as a bar, or in abatement of the suit. But on the other hand, when the facts are not borne out by evidence, the plea, which only rests on the supposition that the facts are true, falls to the ground; and in such case, as the complainant would have been entitled to a full answer upon oath from the defendant but for such a plea, which, as before stated, is used as an *exception* to answering, he will be allowed to examine the defendant upon interrogatories before the master, in order to obtain the discovery, of which he was thus wrongfully deprived.

Sometimes the court, instead of allowing the plea, will order the benefit of it to be saved to the hearing. This occurs, when allowing the facts of the plea to be strictly true, circumstances may come out in evidence which would avoid the effect of the plea, and the court will not therefore preclude the question. [c] At other times the court will order the plea to stand for an answer, which is done when, supposing the plea to be a good defence, so far as it goes, yet that it is not a full defence, or is informally pleaded, or is not sufficiently supported by answer, which is in some cases necessary, as will be fully explained in a subsequent chapter. [d] When the plea is ordered to stand for an answer, the words "with liberty to except" are usually

[a] *Vide* Cap. 10, *infra*.

[b] *Gilb. For. Rom.* 95.

[c] *Beames' Pleas*, 319. *Mitt* 245.

[d] *Vide* Part II, cap. 1 and 4.

added ; as otherwise, according to the strict letter of the order, the complainant could not take exceptions to it. This liberty is, however, frequently qualified so as to protect the defendant from a discovery which would be prejudicial to him. But where the informality of the plea was owing to a slight mistake, the court has allowed the plea to be amended. [a]

Pleas of outlawry and excommunication, which are pleaded *sub pede sigilli*, and pleas of a former decree, and another suit depending, which can rarely admit of dispute, either as to the law or the fact, are referred at once to the master for inquiry, and if he reports the plea to be true, the bill stands dismissed. But the complainant may except to the master's report, or set the plea down to be argued for informality.

Pleas must be signed by counsel as well as by the parties, and are taken by commission in the country or sworn before a master in town, in the same manner as answers, which will be described in the following section.

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#### SECTION IV.

##### *Of Answers, and herein of the Dedimus.*

26. If the defendant has no just cause of exception against the complainant's bill, he must proceed to answer upon oath all the material allegations contained in the bill, by confessing and avoiding, or traversing and denying, each of them separately and distinctly, according to the best of his knowledge, recollection, information and belief. But should the bill seek a discovery of a circumstance which may cause a forfeiture of any kind, or convict a man of any criminal misbehavior, the defendant may demur to such discovery and refuse to answer; for which reason the bill must distinctly waive the penalty, when it calls upon the defendant to admit or acknowledge any fact which would render him liable to a personal forfeiture between the parties.

[a] 2 Anst. 411.

A defendant cannot pray anything in this, his answer, but to be dismissed the court; if he has any relief to pray, or discovery to seek against the complainant, he must do so by a bill of his own, which is called a *cross bill*. The two bills, the original and cross bill, are then usually brought to a hearing together, and are considered as forming in fact but one cause; but this will depend chiefly on the activity of the defendant, who will otherwise have his cross cause heard to considerable disadvantage. [a] The answer being prepared and signed by counsel, is engrossed on parchment, and the defendant is then sworn to the truth of its contents before one of the masters in the public office, and signs his name at the foot of the answer, in the presence of the master, who makes a memorandum of the swearing, with the date of it (called the "*jurata*") on the answer. The like method is used with regard to pleas. A peer or peeress, *propter dignitatem* puts in a plea or answer, on protestation of honor only; a corporation under their common seal.

27. A suit instituted against a defendant residing above twenty miles from town is, as before observed, termed a country cause; and the party in that case is entitled, if he thinks proper, to have a commission under the great seal, to take his answer in the country. This commission is styled a *dedimus*, from the operating words in it, "*dedimus potestatem*," etc. In country causes the defendant is seldom called upon to answer till the ensuing term; and the court in this case, as well as in town causes, grants three orders for time, with the same circumstances and restrictions. The first order in a country cause gives six weeks, the second one month, and the third three weeks. But if a defendant in the country does not require a commission to take his answer, he should regularly answer within the eight days, as in ordinary cases.

28. The *dedimus* is of two kinds, *ordinary* and *special*. The first, which is a commission to take an answer only, being that to which the defendant is entitled, of course, is made out by a clerk in court, without an order, merely leaving a note

[a] *Vide infra*, cap. 11, sect. 2.

in writing with the complainant's clerk, to call upon him for commissioners' names; and this is termed *craving a dedimus*. [a] Each party inserts what commissioners names he thinks proper, and the complainant's clerk in court at the same time directs (as instructed by his client) to which of his commissioners the defendant is to give notice of executing the commission. When the complainant will not name commissioners on his part, an application must be made to the court for an order upon him to name commissioners in two days, or that the defendant may be at liberty to take his commission *ex parte*. After a contempt duly prosecuted to an attachment, with proclamations returned, no *dedimus* is to go without motion. [b]

29. A *special dedimus* is where the defendant is advised to demur and answer, or plead and demur, or to demur, plead and answer, for which purpose the order is to be applied for by motion or petition; but in no case can the defendant demur alone, because a demurrer being taken by counsel only, and put in without oath, a commission is unnecessary, and would only occasion expense and delay. A plea alone, however, may be returned, even under an ordinary *dedimus*, because when sworn to it is a species of answer.

30. A *dedimus* may be made returnable on a general return day, or on a day certain in term; but it is usually made returnable without delay, which, if made out in term, holds to the first return of the ensuing term; if in the vacation, to the last return of the subsequent term. The proceedings, however, are generally adapted to the convenience of both parties, and what time the defendant shall have is usually settled amongst the clerks in court on both sides.

31. The *dedimus*, when sealed, is sent to the defendant's solicitor or agent in the country to be executed, who must give six days notice to the complainant's commissioners to attend, unless it be made out *ex parte*. One commissioner

[a] Hinde, 231.

[b] Beames' Ord. Cha. 178.

attending on each side is sufficient; but in case none of the complainants attend, the defendant must have two of his commissioners, because no less than two can return the writ. The commission is opened at the time and place appointed, by one of the defendant's commissioners, and the like oath is administered, and the same forms observed, as when an answer is sworn in town at the public office. The answer, or other pleading, thus taken, is annexed to the commission; at the foot of which answer the commissioners make a *note* of such taking, with the time and place, called the *caption* of the answer. If there be schedules, they are all to be annexed to the commission, and then the commissioners are to fold up the commission, binding it round with tape and putting their names and seals thereto, and to direct it to the defendant's clerk in court. If one of the commissioners bring the answer and deliver it sealed into the hands of the clerk in court, it is accepted without oath; but when sent by a messenger, the defendant's clerk in court takes him before a master, where he swears that he received the commission from the hands of one or more of the commissioners therein named, and that it has not been opened nor altered since he so received it; and the receipt of it is in both cases indorsed by the clerk. The party which is entrusted with the execution of the *dedimus* is said to have the *carriage* of the commission, and if the first commission is lost by reason of the default or neglect of the party who had the carriage of it, the carriage of the second will be given to the adverse party. But no second commission will be granted without the special order of the court, upon good reason shown, or upon the consent of the complainant. [a]

32 There may also be a commission to the country for assigning a guardian *ad litem* to an infant, or it may be for the double purpose of assigning a guardian and taking the answer of such guardian. In a town cause, the guardian is appointed in open court, upon a personal attendance of the parties. A commission likewise issues for appointing a guard-

[a] Beames' Ord. Cha. 173.

ian to a person reduced by age or infirmity to a state of second childhood. This is obtained upon special application, and is not affected by the distinction of town and country, but may be executed anywhere. With respect to idiots and lunatics, the guardianship is rarely or never assigned as in other cases, the committee of the estate usually applying to be appointed, which is ordered, of course.

The answer, when sworn, is left at the public office until the defendant's clerk in court takes it to be filed, upon notice given him by the solicitor for that purpose. The clerk in court having annexed the answer to the bill, files it with his six-clerk, who then transmits it to the study of the complainant's six-clerk, whence it is taken by the clerk in court, first marking an entry thereof in the six-clerk's book.

## CHAPTER V.

**Of Interlocutory Orders, and References to the Master.**

**33.** At this state of the proceedings, the bill and answer being now filed, the complainant has to consider what next step he shall take in the suit. If the answer admits the material allegations of the bill, the parties may be in a condition to proceed to a hearing immediately; but if, on the other hand, the answer traverses or denies the substance of the bill, the complainant must proceed to join issue by a *replication*, and prove his case by the *examination of witnesses*. These, therefore, are the next proceedings in the regular process of a cause to the hearing, and of each of these in their order.

But on pursuing the answer the complainant may find it prudent to dismiss his bill altogether, or as against some of the defendants; and this he is entitled to do, as of course, at any time before the decree, upon payment of costs; or finding his bill deficient for the purpose of eliciting the discovery necessary to his case, he may move to amend his bill; or, as frequently occurs, the answer itself may be insufficient, scandalous, or impertinent, in which case he moves to have it referred to a master; or, lastly, it may be proper to apply to the court for some special order connected with the object of the suit, as for the production of papers and writings, for the payment of money into court, and such like. Before we proceed, therefore, with the regular course of the pleadings, it will be convenient here to state succinctly the nature of those incidental proceedings which form the ground work of interlocutory orders, and herein of references to the master and his report.



## SECTION I.

*Of Motions and Petitions.*

**34.** As soon as the bill is of record, [a] the cause is regularly in court, and the court will then entertain various applications touching the suit and the matters in litigation and issue its directions thereon, usually termed *interlocutory orders*. These orders are either *common* or *special*. Common orders being such as concern matters incident to *all* suits, are provided for by the usual proceedings of the court, and are therefore obtained as a matter of course, without notice and without opposition—such as orders for the different process of contempt, already described, and the orders for time to answer. Special orders are those which arise out of the peculiar circumstances of the case, and are never granted but on due deliberation, and notice given to the adverse party—such as the order for the production of books and papers, for the payment of money into court, and the like. [b]

**35.** The application for interlocutory orders is either by motion or petition—motion by counsel, “*ore tenus*” in court; petition in writing addressed to the persons holding the great seal, or to the Master of the Rolls; which, after being engrossed, is delivered to the secretary of the judge to whom it is addressed, who is to get it answered. In general, the same objects may be obtained in either of those ways; but there are some orders which will be granted on petition *only*, as on the other hand, some can be applied for only by motion. This difference arises from the different nature of the two modes of application. Motions, when they are not for a common order, (which are motions of course) can only be made upon notice given to the adverse party two days before, inclusive, and affidavit filed for the service thereof on the clerk in court. The notice, however, specifies no more than the names of the parties and the object intended to be applied for; whereas, a peti-

[a] *Vide ante*, p. 24.

[b] For those orders of course, termed *rules*, see *post*, cap. 21, sec. 1, n. [b]; and *vide* *Curs. Can.* 526.

tion sets forth the ground work of the application, and when filed, becomes matter of record. Wherever, therefore, the nature of the case is such that the court or adverse party ought to be put in previous possession of the grounds of the application, or that the reasons for granting the order should remain recorded, the application should regularly be by petition, and not by motion. Thus, an application to the court to give effect to a decree or order of a long standing, must be by petition; [a] so likewise, an order to pay money out of court can be had only on petition. [b] And where the application is merely of a personal nature—asking a favor—the course is by petition, through the secretary of the judge; as, to set down a cause for further directions, or to set down demurrers, pleas, and exceptions for argument, or to set down a cause for an early day. But again, *motions* are always made in open court, where all parties, and the public at large, are present. Whereas, petitions are in some cases a private and “*ex parte*” proceeding. The express orders of the court of chancery, therefore, restrain the proceeding by private petition, where notice to the other side is requisite. Thus, “no injunctions for stay of suit at law shall be granted, revived, dissolved or staid, upon petition, nor any injunction of any other nature, shall pass by order upon petition, without notice, and a copy of the petition first given to the other side, and the petition filed with the register and the order entered; no sequestration, dismissal, retainers upon dismissals, or final orders, are to be granted upon petition. No former order made in court is to be altered or explained upon a petition, or commitment of any person taken upon process of contempt to be discharged, but upon hearing the adverse party, his attorney or clerk, towards the cause.” [c]

Special orders are sometimes made by *consent* of parties, which are not warranted by the general rules of the court: but in such cases the special reasons which induced the court to depart from its ordinary course, must be recited in the order.

[a] 13 Ves: 393.

[b] *Ibid* and *Vide* 2 Mad. Chan. Prac. 495.

[c] Beames' Ord. Chan. 214—5.

35. In cases where the party is *prima facie* entitled to the order applied for, at the same time that a fair objection to it, not then apparent, might by possibility be brought forward on the other side upon notice given, the court will only grant the order conditionally, termed an *order nisi*, i. e. unless good cause be shown against it by another day. Such is the *order nisi* for a sequestration against a peer or member of the house of commons. The notice therefore to the opposite party being material, all *orders nisi* must be *personally* served, and an affidavit of such service produced, before the order can be made absolute. For the same reason, orders which seek to bring the party who is the subject of them into contempt, must be served personally; all others being usually served on the clerk in court, by leaving them at his seat in the six-clerk's office.

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## SECTION II.

### *Of References and Reports.*

37. The application for a special order, whether by motion or petition, is usually supported by an affidavit of the facts relied on; which must be filed in sufficient time for the opposite party to know its contents. In some cases the matter of the application will be determined in the first instance, on hearing counsel on both sides; but if the facts are doubtful or complicated, the court will direct a *reference to a master*, to inquire into the particulars, and *report* accordingly.

38. A *reference* is an order of court, whereby exceptions, contempts, irregularities, matters of account, the choosing of guardians, receivers, purchasers under a sale directed by the court, and such like, are referred to a master to examine and make report of to the court, so that the court may make an absolute order therein; and sometimes the master is empowered by such order of reference finally to determine or settle some matter therein mentioned. [a] The master, on having the order of reference produced to him, grants his *warrant* of

[a] Curs. Can. 426.

summons for the parties to attend him at his chambers, which is served on the adverse party or his clerk in court, by showing it, and delivering a copy; and one whole day must intervene between the day of service and the day appointed for attending the master. If the party is not in attendance at the time appointed, a second and a third warrant is issued, but the third warrant is peremptory, and the master is to make his report "*ex parte*" of that side that attends and desires it.

When both sides are present, the master, on examination of the several matters referred to him, makes his report, which is his certificate to the court of the state of the facts, as they appear to him, or of whatever else it may be his duty to inform the court; and such report must *briefly* express the master's opinion, and not the *special* circumstances, unless the master cannot take it upon him to decide, or the court has given directions to that effect. The report must not on any account, exceed the order of reference. [a]

39. All reports are founded either on matter of *fact* or matter of *opinion*; and in the investigation of the former, if it be necessary for the master to *examine witnesses* in order to ascertain the facts referred to him, he is authorized to do so, and a *subpoena* issues for that purpose; and where the witnesses reside in the country, a commission issues of course, upon the master's certifying that it is necessary.

A person once examined before the master cannot be *re-examined* without an order for that purpose; nor can one who has already been a witness in the cause be examined on a reference before the master, without an order to that effect; and then not to any matters he had before been examined to, or in which he may be interested, to provide against which the master himself settles the interrogatories to be exhibited to him. In like manner interrogatories for the examination of a *party* are settled by the master, and not as in the case of ordinary witnesses, by counsel. Depositions taken in the country, when returned, are filed by the six-clerks; but those taken before

the masters are kept in their offices. If evidence be improperly admitted, exceptions may be taken, as also to an examination generally, if the party considers it insufficient. [a]

40. All reports which are to be the ground of a decree, must be *confirmed* by the court; none others require confirmation, but may nevertheless be excepted to, if either party has reason to be dissatisfied. In the former instance, however, in order to warrant the party in bringing his exceptions before the court, he must have previously stated his *objections*, in writing, to the master; otherwise he is precluded from excepting, unless by special order. In a report, therefore, that requires to be confirmed, the master, before he affixes his signature, prepares a draft of it, which the parties have liberty to peruse and copy; and if either of them have objections to make, he sends in the same in writing, and takes out a warrant to be heard thereon. When the objections are decided, the master *settles* his report, after which no evidence is admitted; and either side may then take out a warrant to attend the *signing*, which is the last stage in the master's office.

After the report is signed by the master, it is to be *filed* with the register strictly within four days after signing; [b] but it is sufficient if the report be filed before any proceedings be had thereon. [c] Where the report is to be the ground of a decree, an *order nisi* must then be obtained to *confirm* it, and if no cause is shown within the time mentioned in the order, it will be made absolute upon an affidavit of service, and a certificate from the register that no order had been obtained for *setting down* exceptions to be *argued*; in which case the court would stay proceedings on the report. But merely filing the exceptions and making the deposit [d] would not be sufficient for that purpose. A report may be confirmed absolutely in the first instance.

[a] See further as to the examination of witnesses, *post*, cap. 10, sect. 1.

[b] Beames' Ord. Cha. 293.

[c] 2 P. Wms. 516.

[d] *Vide* the next page.

**41.** Exceptions to a report are signed by counsel, and must usually set forth the *particular* points in which the report is complained of as erroneous, unless where such a proceeding would be attended with expense or prolixity; in which case the court will permit a general exception to be filed; as where the master reported a schedule to an answer impertinent. These exceptions are filed with the register, and a *deposit* of five pounds made with them, which is to go to the party prevailing on the argument. When filed, either party may obtain an order to set them down for argument.

The time for excepting to a report, when it requires confirmation, is, as we have seen, before it is confirmed absolutely; but sometimes the court will enlarge the time. [a] In other cases there is no precise time fixed; but where the master reports an answer insufficient, the complainant may sue out an attachment for want of an answer, unless exceptions are filed and set down for argument within eight days after the service of *subpoena* for a better answer; and exceptions cannot be filed after an attachment. [b]

On the argument no evidence will be admitted which was not laid before the master upon the objections; nor will subsequent affidavits be received unless they clearly show error in the report, and in such case the court will direct the master to *review* his report, on the exceptant's giving up the deposit. [c] The chancellor will likewise direct the master to *review* his report in *cases* concerning *minors*, if on petition presented praying a *review*, such report appears to be incorrect; for to reports of this nature no exceptions will lie, because these cases are not properly the subject of *reference* to the master, but are rather special delegations of the chancellor's *official* jurisdiction.

**42.** After the facts or other matters thus referred to the master are decided by the report, the court will proceed to

[a] Gilb. For. Rom. 168.

[b] Newl. Cha. Prac. 347.

[c] 2 Atk. 408. 3 P. Wms. 141.

pronounce its order thereon. No order can be made use of until it is *drawn up, passed and entered*. The order is *drawn up* by the attending register as it is pronounced by the court, and the register must recite any former order which has been made touching the same matter, after which he delivers a copy of the minutes to the solicitors on both sides. If there be any doubt as to the meaning, the solicitors on both sides attend the register, in order to *settle* the order; and if by this means it cannot be decided, the court must be applied to, to explain the minutes. Four days are allowed to return the copy of the minutes, with objections, if there be any, before the order is *passed*; which is done by the register's signing his initials at the left hand side of it. It is next *entered*; that is, copied *verbatim* by the entering register, in the register's book, who uses the word "*entered*" at the foot of the order. All orders drawn up by the register are to be passed and entered in *due* time. By the orders in chancery, interlocutory orders, as well as decrees and dismissions made in Michaelmas and Hilary terms, are to be entered before the first day of Michaelmas term following, and those of Easter and Trinity to be entered before the first day of the ensuing Easter. It is therefore a frequent application to enter an order. "*nunc pro tunc*," and this is a motion, of course, where the party comes *recently*; but after a length of time there ought to be notice of such motion. [a] Orders are enforced in the same manner as decrees, which will be treated of in a subsequent chapter.

[a] Wyatt's Prac. Reg. 291, and *vide* Gilb. For. Rom. 163.

## CHAPTER VI.

Of Injunctions, *ne Exeat Regno*, and *Certiorari*.

43. Before we conclude this head of Interlocutory Orders, it will be proper to give a particular consideration to that peculiar class which are specifically prayed for by the bill, namely, the order for an *Injunction*, for a *Ne Exeat Regno* and a *Certiorari*.

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## SECTION I.

*The Injunction.*

44. An injunction is a prohibitory writ, deduced to the defendant, to restrain him from doing some act contrary to equity and conscience, whereby the complainant would be aggrieved, and which therefore forms a principal part, and sometimes the whole of the relief sought for by the bill. The complainant must, consequently, specifically pray for such relief, otherwise the court will not interfere to assist him, unless the necessity for the injunction grows out of the proceedings, and not from the original situation of the parties. [a] Hence it appears that an injunction partakes somewhat of the nature of a decree, because it involves the *rights* of the parties and the ground of action; and it is from this amphibious character that its peculiarities arise. Thus the application for it must be by *motion*, as for an order; and also by bill, as for relief. Like a decree, too, it is decided on the merits disclosed by bill and answer; and the order being special, notice of motion must be given on the coming in of the answer. This is the *ordinary* injunction. But as some occasions for an injunction are of so urgent a nature as that in waiting for the answer to be filed irreparable mischief might in the mean-

[a] 1 Ves. & Beames, 314.

Eq. PL.—6.



time be done, the court will in such cases grant an injunction before answer, on the complainant's application, supported by an affidavit of merits. These are termed *special injunctions*.

45. As, however, the injunction to restrain unconscionable proceedings at law cannot stand in need of such expedition, it is never granted on *special* application. [a] But should the defendant in such case be in contempt for want of an appearance or answer, or even pray a *dedimus* or an order for time, or upon a demurrer or plea overruled, the injunction will be granted *as of course*, until answer *and* further order. This is called the *common injunction*, because obtained on common order. If, however, the defendant resides abroad, the application, even for the injunction to restrain proceedings at law, must be supported by an affidavit of the material facts alleged in the bill. [b]

46. The effect of this common injunction is only to prevent the defendant (plaintiff at law) from taking out *execution*, if he had previously filed his *declaration*; in which case he might proceed, notwithstanding the injunction, through all the subsequent steps, up to *execution*. If in such case, therefore, the complainant desires to stay trial as well as execution, he must apply *specially* to the court to *extend* the injunction, on an affidavit that the discovery sought for in the defendant's answer is material, and that he cannot safely go to trial without it; nor will this be granted in the first instance, but must be grounded on the common injunction. [c]

An injunction to stay proceedings after judgment is never granted before answer, except on common order, for want of appearance of answer (unless where a warrant of attorney has been fraudulently obtained), because the parties ought to have applied sooner; [d] nor can an injunction be obtained to prevent the sheriff's selling under an execution, unless an

[a] 18 Ves. 522. 2 Meriv. 476.

[b] 11 Ves. 567.

[c] 16 Ves. 223. 2 Ves. and Beames, 41.

[d] 3 Meriv. 225-6.

injunction has been previously granted against the defendant to stay execution. [a] The *common injunction* does not extend to stay proceedings in the spiritual courts, or courts of admiralty; but after the defendant is in contempt for want of appearance or answer, the court must be applied to *specialty* to restrain proceedings in these courts, [b] in order that it may ascertain the propriety of restraining their jurisdiction for want of competent authority to do complete justice.

46. The *common injunction* being always granted till answer *and* further order, cannot be dissolved until the defendant has answered and cleared his contempts (if any); nor even then, in the first instance. The course is to move for an *order nisi* to dissolve it, and on the day fixed for showing cause it is argued on the merits.

47. It is a general rule that affidavits contradictory to the answer, when filed subsequent to it, cannot be read; but there is an exception to this general rule, in the case of waste and of injuries analogous to waste. [c] The complainant, therefore, must rely upon the admissions in the answer for showing cause against dissolving the *common injunction*; or if the answer has been referred to a master, for impertinence or insufficiency, it is good cause, a defective answer being as none. In this latter case, however, the complainant must undertake to procure the master's report upon the impertinence, in a week; upon the insufficiency, in four days; or, in the default thereof, the injunction to stand dissolved without further motion. [d] Nevertheless, if the exceptions are afterwards allowed, it is a *motion of course* to revive the injunction. [e] Should the master report the answer sufficient, the injunction is *ipso facto* gone; but it is still competent for the complainant, by a special application, to revive it on the merits admitted by the answer. [f]

[a] 1 Mad. Chan. Prac. 132, and the MS. case there referred to.

[b] 1 P. Wms. 300-1.

[c] 16 Ves. 49. 19 Ves. 144-8; and *vide* 1 Swanst. 252.

[d] 14 Ves. 534.

[e] 1 Dick. 292. Gilb. For. Rom. 197.

[f] Gilb. For. Rom. 197.

48. When an injunction is obtained or continued, upon bill and answer, it remains in force until the hearing. But it happens in most cases of injunction (except to stay proceedings at law) that the delay consequent upon waiting for the defendant's answer, even when filed within the ordinary time, might be productive of irreparable mischief—as where the defendant is committing waste, or threatening an irremediable nuisance, or the like. In instances of this kind the court, being *specially* applied to, will grant an injunction *immediately*, on certificate of the bill being filed, and an affidavit of merits; but such affidavit must distinctly allege the complainant's title, and the commencing or threatening of the injury sought to be prevented. If the application be made after the defendant has appeared, as this is a special order, notice must be given. But as the circumstances may be urgent, an *injunction ex-parte* will be granted before appearance, and even before the service of *subpœna*. [a] There are some instances where this writ has been granted in vacation, or between the seals, upon *petition* and affidavit, and certificate of the bill filed. [b] These *special injunctions* are, by the terms of the order, to continue until answer, *or further order*; in which respect they differ from the common injunction, which remains in force until answer *and further order*. By this it appears that special injunctions may be dissolved at the option of the party, upon the answer coming in, or upon affidavit before answer. They differ also from the common injunction in another essential particular, namely, that upon the answer coming in they do not require the order *nisi*, but may be dissolved by special motion in the first instance; nor, consequently, are exceptions to the answer cause for continuing them. [c]

49. If a plea or demurrer be put in, an injunction cannot be obtained until their sufficiency is decided, because the court, until then, cannot judge whether it has cognizance of

[a] Amb. 68.

[b] 2 Ves. & Beames, 351.

[c] Newl. Chan. Prac. 227.

the cause. [a] If, however, the demurrer or plea be overruled, the defendant will be placed in the same situation that he would have been in but for such untenable defence. [b] It is a frequent application in such case to have the demurrer or plea argued out of its course, because it prevents the injunction. [c]

50. An injunction must be *served* personally on the defendant, by showing him the writ itself, under seal, and delivering him a true copy. Under special circumstances, however, the court will substitute service on the attorney or solicitor; [d] and in the cause of a special injunction, where the party absconded, the court has ordered that service at the house which appeared to be his last place of abode should be deemed good service. [e] A *breach* of the injunction on special motion and affidavit, is punished by committing the offender to the fleet. Against peers or members of the house of commons, in the like case, a sequestration will issue in respect of their privilege.

51. The Court of Chancery in some cases grants a perpetual injunction, which operates as a decree, as to quiet possession and the like.

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## SECTION II.

### *Ne Exeat Regno.*

52. The writ of "*ne exeat regno*" was originally a writ to restrain one from leaving the kingdom without the king's license, and used only for purposes of state; but it has since become a writ of right, as between subject and subject, in matters of *equitable* cognizance, when it is apprehended that the party against whom it is prayed intends going out of the

[a] 3 P. Wms. 396.

[b] 3 Meriv. 225.

[c] 13 Ves. 167; and see *Jones v. Taylor*, 2 Madd. Rep. 181.

[d] Newl. Chan. Prac. 231.

[e] 5 Ves. 147. 14 Ves. 205.

jurisdiction, and a debt is endangered thereby. [a] It is not necessary in every case, in order to obtain this writ, that it should be prayed for by the bill, because it is not always, like an injunction, a part of the relief sought, and the necessity for it may arise subsequent to the filing of the bill; but it will not be granted unless there is a cause in court. It is usual, however, to make the application for it, in the first instance, in the prayer of the bill, or, at a later stage of the proceedings, to move for liberty to amend the bill for that purpose. [b] This writ issues only on an *equitable* demand, with the exception of a decree for alimony where it issues for the arrears, but for those only, and costs; the reason for which is, that the spiritual court has no authority to enforce its decrees. [c]

**53.** The order for a "*ne exeat regno*" is obtained either by motion or petition, supported by an affidavit, which must be *positive* both as to the amount of the debt sworn to be due, and as to the defendant's intention of going abroad. It must not be a debt for which the defendant is liable to be arrested at common law, unless it be on matter of *account*, for here equity has a concurrent jurisdiction; and, in this latter case, an affidavit as to *belief* of the amount will be sufficient, because it might be impossible to swear positively to a sum due at foot of an unliquidated account. [d] If the amount of the sum appears by the master's report, no affidavit to that fact is necessary. [e] In like manner, it is not enough for the complainant to swear that *he believes* the defendant intends leaving the kingdom, but he must state some declaration on his part to that effect, or some clear circumstance evidencing his design. [f] An admission in the answer will be sufficient for that purpose, without an affidavit. [g]

[a] Cnrs. Can. 455

[b] 2 Vern. 435, note 1; and *vide* 1 Ves. & Beames, 129, 371.

[c] 2 Atk. 210. Where the reason assigned by Lord Hardwicke is, "out of compassion to the wife, and to aid the spiritual court." And *vide* 7 Ves. 171, 173, 410; 14 Ves. 261.

[d] 3 Atk. 501. 8 Ves. 593; 10 Ves. 165.

[e] 18 Ves. 353.

[f] 7 Ves. 417. 11 Ves. 54. 18 Ves. 355.

[g] 6 Ves. 95.

54. The writ is usually directed to the sheriff, and commands him to cause the party to give a sufficient security (a bond with sureties, in a penalty double the amount of the sum sworn to be due, and which is marked on the back of the writ), that he will not go, or attempt to go out of the jurisdiction, without the leave of the court; otherwise to commit him to prison. No *subpœna* is sued out along with this writ, although it is always prayed for; but the defendant, on being personally served with the writ, is bound to appear and answer. [a] If he be arrested by the sheriff he must give fresh security to the master of the rolls, which is equivalent to the "*bail above*" at common law.

55. The terms of the order are, until "*answered, AND further order.*" When, therefore, the defendant has appeared and answered, he may, upon notice, move to *discharge* the order, which is usually granted on his entering into a recognizance with the master to abide the event of the suit, or on his paying the money into court. [b] If the defendant by his answer, or even by *affidavit* before answer, denies the equity, on hearing counsel on both sides, the writ may be *superse- ded*; [c] but the distinction appears to be that an affidavit cannot be read against an affidavit, though the answer may.

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### SECTION III. [d]

#### *Certiorari.*

56. If one be sued in an inferior court of equity, whose jurisdiction is limited, the party so sued may file a bill in chancery to have the plaint and proceedings in such suit removed to this court upon a *suggestion*, that either from a defect of authority in the inferior court, or some other adequate cause, equal justice cannot be done there. This bill is

[a] 5 Ves. 96-9, and Reporter's note.

[b] 3 Bro. C. C. 218. 1 Ves. & Beames, 133, 373.

[c] Curs. Can. 456.

[d] Vide 1 Madd. Chan. 182.

called a "*certiorari bill*," from the writ which it prays, and which is the only prayer contained in it. The writ of *certiorari* is directed to the judge of the court below, requiring him to *certify* or send to the judge of the court of chancery the bill or plaint, and all proceedings thereon. The order for this writ is obtained on motion, and a certificate of the bill filed; but before the writ is made out and delivered, the complainant in the *certiorari* bill must enter into a bond, with a surety, to the master of the rolls, in a penalty of one hundred pounds, to prove the *suggestions* of his bill within fourteen days after the return of the writ. This time may afterwards be enlarged, on special motion, and good cause shown. The writ itself is returnable in fourteen days after service of it on the defendant; and when returned will, on motion for that purpose, be filed, together with the proceedings removed.

57. The interrogatories to prove the suggestions are filed with the examiner, and the witnesses are examined by the complainant only, the defendant having no permission to rebut their testimony. An order is then obtained to refer the examination to a master, and if he reports the suggestions of the bill to be proved, the court may be moved on such report to have the bill retained. On the other hand, if the master certifies that the suggestions are not proved, a "*procedendo*" may be applied for, which is a writ directed to the judge of the inferior court, desiring him to proceed in the cause which was sought to be removed. When a *certiorari* cause is brought on to a hearing, the court may, if it think proper, and frequently does, send it back to the inferior court to be determined. [a]

[a] 2 Vern. 431

## CHAPTER VII.

**Of Amending the Bill and Further Answers.**

**58.** Having in the preceding chapter, treated of interlocutory orders in general, and given a distinct consideration to those which must be prayed for in the bill, and whence it usually derives its denomination as an "injunction bill," or a "certiorari bill," let us now revert to the situation of the parties and the position of the suit when the bill and answer are both filed. On perusing the answer, the complainant, as has been formerly stated, may discover that his own bill has been defective for the purpose of drawing a full answer from the defendant, or bringing the matter of complaint fairly before the court, in which case he moves to amend his bill; or he may find that the defendant has not put in a *sufficient* answer, having either evaded or passed over some of the positions of the bill; or perhaps the answer may contain *scandal* or *impertinent* matter; in either of which events he takes *exceptions* to such answer, and moves to refer the bill, answer and exceptions to a master, for his judgment thereon. These, though merely incidental circumstances, yet are of such frequent occurrence that we cannot wholly omit the consideration of them in a review of the proceedings in this court.

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**SECTION I.***Of Amending the Bill.*

**59.** The complainant is, at all times before he files his replication, at liberty to amend his bill, as a matter of course, and even without costs, if he does not thereby put the defendant to any additional expense. In the other alternative, however, as where the defendant is obliged to put in a further answer to such amendments or to take out a fresh copy of the



bill, the order to amend is only granted on payment of twenty shillings costs. On the same principle, if the defendant has put in a defective answer, to which the complainant excepts, he may amend his bill without costs, and obtain an order to have the amendments and exceptions answered at the same time, because a defective answer is as none, and the further answer is in this case rendered necessary by the defendant's own default.

**60.** The amendment of a bill puts an end to all process of contempt which may have been sued out against the party, because an original and amended bill are one and the same record; and therefore, when the bill is perfected by amendment, the proceedings must be commenced "*de novo*." This rule is carried to the extent of where even the amendments are only the addition of necessary parties. [a] For the same reason in an "injunction bill," after the injunction is obtained on the merits, the order is not of course, to amend the bill, but the complainant must make a special application to the court to amend his bill, *without prejudice* to the injunction, [b] for which also there seems to be this additional reason, that since the injunction is allowed upon the merits disclosed upon bill and answer, the court will not permit the subsequent addition of any new matter, without taking such new matter into cognizance, because it might possibly affect the reasons on which the injunction was founded. The injunction will not be granted after amendments to an original injunction bill, unless there is a positive affidavit that the facts stated in the amendments were not sooner known to the complainant. (c) Upon the principles above stated, an order to amend, without prejudice, will not be granted in the case of the common injunction. [d] Special injunctions being granted on affidavit, are not within the rule.

**61.** After the replication is filed, as we shall see further on, the pleadings on the part of the complainant are con-

[a] 2 Cox, 411.

[b] 2 Ves. & Beames, 331. 2 Sch. & Lefr. 516. 2 Ves. 21.

(c) 3 Ves. & Beames, 144, 145.

(d) 2 Ves. & Beames, 330. 3 Madd. Rep. 470.

cluded and issue is joined in the suit, consequently no substantive amendments can be admitted after that period, for that would be to open the pleadings a second time; but even then, under special circumstances, the complainant will obtain leave to withdraw his replication in order to add an amendment. This indulgence, however, will not be granted after the publication of the depositions, for it would be unjust to permit the complainant to put new facts in issue, when he should happen to find that those on which he originally relied were not substantiated. In such case his only proceeding is to file a supplemental bill, which we shall notice subsequently.

**62.** But an amendment, by merely adding new parties, will be permitted at any time, even at the hearing of the cause, (a) for none are bound by the decree but those who are parties to the suit; and it is sometimes difficult to ascertain who are necessary parties to make a decree effectual, many of them being merely collateral. But when the bill is for a discovery merely, an amendment, by adding parties, will not be allowed; (b) because, as such bill does not seek a decree, no objection can be raised to it for want of proper parties. When such parties are added after publication, they must be heard on bill and answer only, for the court will not permit new evidence to be adduced after trial, which in chancery is closed by the publication of the testimony.

**63.** The amending a bill, after a plea or demurrer put in, is an admission of their validity; and if the liberty to amend be obtained before the plea or demurrer be set down for argument, only 20 shillings costs are incurred; but when the amendment is made after they are set down, the complainant must pay full costs. When a plea or demurrer to the *whole* bill is allowed upon argument, the bill is out of court and no amendment will then be permitted.

**64.** If a bill is amended after a *full* answer has been put in, and a further answer is required to the amendment, it is

(a) 1 Atk. 51. 3 Atk. 370. 1 Atk. 289.

(b) 2 Meriv. 74.

necessary to sue out a fresh *subpœna* for that purpose. (a) But if, after exceptions to the answer are allowed or submitted to, the bill is amended and the complainant obtains the usual order that the amendments and exceptions shall be answered together, a new *subpœna* is not requisite. Where a further answer is not demanded, the practice is that on service of the order to amend, the defendant must bring his office copy to the complainant's clerk in court, to be amended; and *he is at liberty* to put in a further answer within eight days after service of the order, before which time the complainant cannot file a replication. (b) When the complainant has obtained an order to amend after answer, and neglects so to do, the defendant may, after three terms, move to discharge the order, and at the same time to dismiss the bill in the usual manner. (c)

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## SECTION II.

### *Of Exceptions to the Answer.*

65. When the defendant answers evasively, or omits altogether to answer any of the material points of the bill, the course is, as has been already observed, to take exceptions to such defective answer. The exceptions must be in writing, and state the precise points in the bill unanswered, or imperfectly answered; and they are likewise to be signed by counsel, who thereby vouches for their propriety.

66. After the exceptions have been drawn they are to be filed, which is done by the complainant's clerk in court delivering them to the clerk in court of the defendant, at the same time marking them at the top with the day and year when delivered. If the answer has been filed in term time, the exceptions should *regularly* be filed the same term, or eight days afterwards; if the answer be filed in the vacation, the com-

(a) *Vide* Newl. Cha. Prac. 197; and the case of *Pennington v. Lord Muncaster*, cited in the note.

(b) *Hinde*, 25.

(c) *Vide infra*, p. 82.

plainant has till eight days after the commencement of the ensuing term to file his exceptions. (a) But though this is the ordinary time allowed, it is a motion, of course, for liberty to file exceptions "*nunc pro tunc*," if the application be made within the two next terms and the following vacation. (b) Nor is the rule different in the case of a mere bill of discovery, although formerly thought otherwise, because, in a suit instituted for discovery only, the answer terminates the proceedings. (c) After the period above mentioned, the court will only grant such order under peculiar circumstances. (d) If there be separate answers, each deficient in the same particular, separate exceptions must be taken to each answer.

**67.** When the exceptions are once filed, the court is very strict and will not allow new ones to be added. (e) So exceptions cannot be regularly taken after an amendment, although the court will sometimes permit the complainant to amend, without prejudice to exceptions; (f) but the course is, as we have seen, to except first, and on the exceptions being allowed, to move to have the amendments and exceptions answered together. In like manner, no exceptions can be taken to an answer after the replication is filed; for by the replication its sufficiency is admitted; yet here, also, in some cases the court has ordered the replication to be withdrawn, and permitted exceptions to be filed. (g)

**68.** A defendant has eight days after the complainant has filed his exceptions, to make his election whether he will submit to answer them or not. If he submit to put in a further answer, he must pay the complainant 20 shillings costs before such answer will be accepted; and in default of answer, the usual process issues against him. On the other hand, if the defendant is advised that he has answered all that is material

(a) Beames' Ord. Chan. 181.

(b) 6 Ves. 823.

(c) See *Baring v. Prinsep*, 1 Mad. Rep. 526.

(d) 3 Atk. 19. 14 Ves. 538.

(e) 11 Ves. 575, 580.

(f) 12 Ves. 456.

(g) Harr. Chan. Prac. 197.

Eq. PL.—7.

and means to dispute the validity of the exceptions, he puts the complainant upon procuring an order of reference to the master, who makes his report thereon in the manner described in a former section. If the master reports the answer sufficient, the complainant pays 40 shillings costs; if he allows the exceptions, the defendant must pay a like sum, or 50 shillings if it be a country cause. For a second answer, reported insufficient, the defendant must pay 3 pounds; 4 pounds for a third; and if he puts in a fourth imperfect answer, he pays 5 pounds, and the complainant having filed the master's report, may move to have him committed and examined on interrogatories. (a) The party who becomes entitled to the costs in the above mentioned cases, sues out a *subpoena* for costs against the opposite party, which must be served personally; and such costs are made payable to the bearer on demand. On a second reference for insufficiency, new exceptions cannot be added; but if there have been amendments, there may be new exceptions as to the answer to such amendments.

69. The complainant, it has been observed, cannot refer exceptions to a first answer until eight days after they are filed; but upon a second and subsequent insufficient answers, they may be referred immediately. A first answer may also be referred immediately in an *injunction cause* where dispatch is required. (b) But beyond the eight days he is not restricted to any particular time for referring the exceptions, for it is his own loss if he neglects or delays to do so; and the defendant may, at any time, obtain an order on his part for a reference, and so have the matter decided.

70. Exceptions cannot be taken to an infant's answer, because he is not bound by it, but may amend it when he comes of age; (c) nor to the answer of attorney general. (d)

(a) Beames' Ord. Chan. 182 317.

(b) Newl. Chan. Prac. 185, and the MS. case cited in the note.

(c) 1 Ves. Jun. 494. 4 Bro. C. C. 256. 13 Ves. 27.

(d) Madd. Chan. Prac. 346, and the cases cited in the note.

**71.** It is to be observed, likewise, that in case of a defendant pleading or demurring to part of a bill, and answering to the residue, if the complainant take exceptions to the answer before the plea or demurrer has been argued, he admits the plea or demurrer to be good; for unless he acknowledges their validity it would be impossible to determine whether the answer is sufficient or not. (a) If the plea or demurrer be in such case overruled, he must then take exceptions to the answer for insufficiency, in such parts as were attempted to be covered by the plea or demurrer: but where the demurrer or plea had been to the whole bill, there is no necessity for exceptions, because when such are overruled no answer remains, and the defendant is bound by the original process to answer in due time.

**72.** When the exceptions are either allowed or submitted to, the defendant must put in a *further answer*. So, likewise, if there are amendments added to the bill after a full answer. There is this difference, however, between a *further answer* after exceptions and a *further answer* to an amended bill, that as the former is rendered necessary by the defendant's own act, a new *subpœna* to answer is not required, it being sufficient to give the defendant a rule to answer; (b) and the court will, *as of course*, grant but one order for time, either in a town or country cause. (c) In the latter instance, as we have already seen under the head of Amendments, a new *subpœna* is necessary when a further answer is required, and the defendant is entitled to the usual orders for time, as for the original answer; and even though a further answer to the amendments should not be called for, yet still the defendant is *at liberty* to answer, and take the common orders, if he thinks proper, before the complainant can proceed with his suit. (d) A further answer is similar in all incidents to, and is considered as forming part of, the original answer.

(a) Mitf. 256.

(b) Beames' Ord. Chan. 250-1. and the note.

(c) Hinde, 261.

(d) *Ante*, p. 66.

## SECTION III.

*Of References for Scandal and Impertinence.*

**73.** An answer also may, in like manner as a bill, be referred for *impertinence* or *scandal*; and if the master reports accordingly, an order is obtained to send it back to the master, to expunge the irrelevant or offensive matter, and to tax the party his costs. It is to be observed that no reference can be had for impertinence after exceptions taken for insufficiency, for such would be a vexatious and incompatible proceeding; (a) but, on the other hand, after an answer has been reported impertinent, exceptions may be taken for insufficiency; and the time for filing such exceptions is regulated by the date of the master's report, and not from the time of filing answer. (b) If, pending a reference for impertinence, the complainant files exceptions for insufficiency, he waives the former objection. (c)

**74.** For the reasons stated in the preceding section, there cannot be a reference for impertinence after the replication is filed; but it is otherwise with respect to scandal, which may be referred at any period, because the court is anxious to have the records of its proceedings pure and untainted. (d)

**75.** By a general order all references of answers for insufficiency or for scandal and impertinence, made in the same cause, must be made to the same master; and where answers of defendants have been referred for scandal and impertinence, or for impertinence, and the court shall afterwards refer the same for insufficiency, the latter reference is to be made to the same master as on the former reference. (e)

(a) 6 Ves. 458.

(b) 1 Meriv. 1.

(c) 6 Ves. 458.

(d) 2 P. Wms. 312, in the note.

(e) 10th March, 1818. Vide 3 Madd. Rep. 317. 1 Swanst. 28.

## CHAPTER VIII.

## Other Interlocutory Applications.

## SECTION I.

*Of Paying Money into Court, and of the Appointment of a Receiver.*

**76** There are two other interlocutory applications on the part of the complainant, which, from their frequency and because they are connected with the matter of the suit, deserve to be noticed in this place, viz: for the payment of money into court, and the appointment of a receiver. They are both founded on the same principle, namely, where a party admits, either by answer or affidavit, (a) or it appears by the master's report (b) that he has property in his possession, to which the person making the application has some claim, but that the distinct interests of the several claimants cannot be ascertained without the assistance of the court.

If the property in question be a gross sum of money, the party is directed to pay it into court on a certain day named in the order; (c) and if the order is not complied with a writ of execution issues. But if such order be obtained against a person who is not a party to the suit, on his disobedience, the practice is to move for a second order, that he shall pay it by another day or stand committed.

**77.** When the property in litigation consists, not of a gross sum, but of income, as the rents and profits of land, or the profits and produce of any other species of property, a receiver is appointed. But a party to be entitled to move for a

(a) 6 Ves. 738.

(b) 3 Ves. 572.

(c) 8 Ves. 381.



receiver, *before decree*, must have a prayer to that effect in his bill. (a) A receiver is an officer of the court; for which reason no ejectment can be brought against him without the leave of the court, nor can *he* bring one without its authority. (b) If a person sets up a claim to the estate, he may be ordered to come in and be examined "*pro interesse suo*," as in the case of a sequestration. (c)

**78.** The appointment of a receiver is referred to the master, that he may consider of a proper person to discharge the office. For that purpose a proposal of some fit person is laid before him, together with two sureties for his proper conduct. Neither a solicitor (d) in the cause, nor a trustee, (e) nor a *prochein ami*, (f) are eligible, on account of their privity and connection with the matters in dispute; nor can a peer (g) be appointed, because the court could not have sufficient control over him. The person appointed receiver, and the sureties, must enter into recognizances that he shall duly pass his accounts annually before the master, (h) and pay in his balances on the days fixed on by the master for that purpose. In default thereof the receiver not only loses his salary, but is charged five per cent. per annum on the balances in his hands. (i) If an order has been obtained against a receiver who has neglected to pay in his balance, and he still fails to do so, either the recognizances may be put in suit or he may be committed; but in the latter case a previous order must be had that he should pay by a certain day, or stand committed. (j) When the master has certified to the court that the receiver has duly passed all his accounts, the recognizances will be vacated; previous to which the sureties will not be discharged. (k)

(a) 3 Atk. 690.

(b) 3 Bro. C. C. 88. 9 Ves. 336. 6 Ves. 283.

(c) 1 Ves., Jun. 85. 2 Dick. 472.

(d) 3 Ves. Jun. 137. 2 Meriv. 452.

(e) 8 Ves. 72.

(f) 2 Madd. Rep. 74.

(g) 2 Ves. & Beames, 208.

(h) Beames' Ord. Cha. 454.

(i) *Ibid.* 462. 15 Ves. 273.

(j) 14 Ves. 143.

(k) 2 Ves. 401.

**79.** All sums of money ordered to be paid into this court must be lodged in the Bank of England, to the credit of the cause, with the privity and in the name of the accountant general, who is an officer created by the 12 Geo. I. for that purpose. Any of the parties to the suit may apply by motion or petition to have such money laid out and invested in government securities for the benefit of the parties interested in the cause. When a sum of money is paid into the bank a certificate thereof is filed in the report office by the accountant general, and an office copy taken by the solicitor. This certificate is afterwards requisite for persons applying to receive money out of court, either by order or decree.

**80.** And this concludes our head of Interlocutory Orders, which it was thought convenient to insert in this place, as well to lead the student regularly through the order of the proceedings as to make him acquainted with the terms of art, which being unknown might render other parts of this work in which they occur either unintelligible or at least difficult to be comprehended. The examples given have been selected with that view, and are put as illustration, merely, it being impossible to enumerate all the orders which are made in the course of practice, they being as various as the circumstances on which they are founded.

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## SECTION II.

### *Of Putting the Complainant to his Election.*

**81.** Before, however, we enter upon the regular course of the suit, it will be necessary to advert to one more incidental proceeding, which is taken whenever a complainant thinks proper to sue for one and the same matter, both in law and equity, at the same time, where both courts have a concurrent jurisdiction. In such case, as this court will not suffer a defendant to be harassed by two proceedings for the same cause, he will obtain, *after* his answer has been duly filed, an order, as of course, to put the complainant to his *election*

either to proceed at law or in equity. (a) But the complainant is entitled to a complete answer before he can be put to his election, because he has at all times a right to a discovery in this court, though not to relief, if he chooses to seek it elsewhere. For this reason the common order will not be granted until the time for filing exceptions has expired; and if there be exceptions, not until they are answered or the answer reported sufficient. (b) A plea being an excuse for not answering, is of course not an adequate ground for the common order. (c)

**82.** After the order to make an election is served on the complainant's clerk in court, he has eight days wherein to make his election. If he elects to proceed at law, or in default of such election, within the time prescribed, his bill will stand dismissed, with costs. (d) If he elects to proceed in equity, by the terms of the order an injunction issues to stay his proceedings at law. A party may move to discharge the order putting him to his election, and insist that it was obtained upon a false allegation, that the suits are for the same matter; and if the court has any difficulty in determining whether they are so or not, then a reference to the master is directed and all proceedings are stayed in both courts in the meantime. (e) The election is filed in the report office, and signed by the complainant's clerk in court.

(a) 3 Atk. 558. Gilb. For. Rom. 114.

(b) 3 Md. Rep. 24.

(c) 3 Meriv. 45.

(d) 3 P. Wms. 90.

(e) 3 Ves. & Beames, 9. 1 Ves. & Beames, 381.

## CHAPTER IX.

## Of Joining Issue, and of Dismissing the Bill.

## SECTION I.

*Of Hearing upon Bill and Answer.*

**83.** Having now followed the progress of the suit through all its intermediate and incidental steps, we next come to consider whether the cause in its present stage be ripe for hearing. This will depend upon whether there be sufficient matter *confessed* in the defendant's answer, upon which to ground a decree. If the complainant chooses to rest his case upon the admissions in the answer, and there be sufficient to warrant the judgment of the court, the cause may be set down for hearing upon bill and answer only; but in this case the answer must be admitted to be true in all points, and no other evidence will be allowed, unless it be matter of record to which the answer refers, and which is proveable by the record. Therefore, in many instances where the answer confesses, and avoids by new matter, it will be prudent for the complainant to reply, even though he require no witnesses on his part, in order to put the defendant upon proof of his answer. A defendant to a bill brought by an infant must always prove his answer, even though the infant do not reply, because the interest of an infant is under the peculiar protection of the court, and he is not bound by an admission. [a]

**84.** If the complainant go to hearing on bill and answer, and the court shall not see cause to make a decree thereupon, for want of sufficient matter confessed by the answer, the bill will be dismissed with costs; or the complainant may be ad-

[a] 2 Atk. 377, but see 3 Wms. 273, note [a]; and *vide* 3 Ves. & Beames, 20.

mitted to reply on paying down five pounds (or such other costs as the court shall think fit for the day), within four days after such hearing, which if he fails to do, the dismissal must stand, and being signed and enrolled, may be pleaded in bar to a new bill for the same matter. [a] "The complainant is therefore to be well advised that the court be not put to an unnecessary trouble, and himself to a certain charge, in bringing his cause to hearing, which will not bear a decree." [b]

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## SECTION II.

### *Of the Replication and Rejoinder.*

85. Our next inquiry, therefore, will be, what are the steps necessary to be taken in order to put the cause in such a situation as that a full decree may be pronounced. If the deficiency lies in the complainant's bill, the course is, as we have already seen, to obtain an order to amend it. If, on the other hand, the complainant can prove the facts stated in his bill, though not admitted or even denied by the defendant; or if he has reason to doubt the truth of the defendant's statement in his answer, he proceeds to take issue, which is done by the pleading called a *replication*, to which the defendant "*pro forma*" rejoins; and thus both parties are put upon the proof of their respective allegations, so far as they are not admitted on the other side.

86. The replication is now nothing more than a general reply to the defendant's answer, averring the bill to be true, certain and sufficient, and that the answer is directly the reverse, all which the complainant is ready to prove, as the court shall award; upon which the defendant rejoins, averring the like on his side, which is joining issue upon the facts in dispute. Formerly it was the custom to reply specially to the defence, which produced in turn special rejoinders, and the

[a] Hinde, 417.

[b] Beames' Ord. Cha. 180.

whole train of special pleading, with all its niceties with regard to departures, etc., as at common law; but since the practice of permitting the complainant to amend his bill, and requiring a further answer to the amendments, has been adopted, special replications have fallen into disuse, which has materially shortened and simplified the pleadings in this court. The replication and rejoinder are at present, therefore, little more than common forms, the former tendering and the latter joining issue, by means of which the pleadings are closed preparatory to the parties examining their witnesses. And, indeed, the rejoinder is never actually filed, the defendant either appearing "gratis" to rejoin, or his clerk in court being served with a *subpœna* returnable *immediate* for that purpose, which is equivalent to a notice of the complainant's intention to dispute the facts. The replication, however, being the ground-work of such *subpœna*, must be regularly filed before the return. [a]

87. If the facts of a plea are intended to be disputed, the same formal replication is to be used; and where there is a plea, and an answer in support of it, the complainant must reply to both, [b] that the defendant may have the benefit of proving his answer in support of his plea, the validity of which, in law, is admitted by replying to it. The replication being, as we have observed, mere matter of form, need not be signed by counsel.

88. It is to this point that a person who files an *interpleading* bill is obliged to carry the suit, leaving the several claimants (who are made defendants) to adjust their demands by making proof of their rights. [c] The replication is in the usual manner of other pleadings, engrossed on parchment and filed with the six-clerk.

[a] Beames' Ord. Chan. 109, 183.

[b] 2 Vern. 46. Hinde, 289.

[c] *Dungay v. Angrove*, in Cha. 19th July, 1791. 2 Ves. & Beames, 497.

## SECTION III.

*Of Dismissing the Bill for want of Prosecution.*

89. The replication must be filed within three terms after the answer, exclusive of the term in which the answer was filed, otherwise the bill is liable to be dismissed for want of prosecution, unless some step in the cause has been taken in the meantime, as an order to amend the bill, or to refer the answer, and the like. [a] And in general, when a complainant suffers three terms to elapse, at any stage of the proceedings, without moving forward in the cause, where it rests *solely* with him to do it, his bill may be dismissed for want of prosecution, which is in the nature of a nonsuit at law. But it is otherwise if the defendant himself proceed; as after a demurrer, or a plea filed, [b] though not set down to be argued, he cannot move to dismiss the bill, because the plea or demurrer may be set down for argument on the defendant's petition as well as the complainant's. So, also, after publication is passed, the cause may be set down for hearing "*ad requisitionem defendantis*," and will not therefore be dismissed for want of prosecution. Where the bill is for discovery merely, and consequently there is no proceeding beyond the answer, the course is to pray for an order that the complainant shall pay the defendant the costs of the suit, to be taxed. [c]

90. There is an important difference, however, between the application to dismiss a bill made *before*, and that which is made *after* the replication filed. The former is a motion, of course, [d] and the order is obtained upon merely producing the six-clerk's certificate. However, under special circumstances, supported by affidavit, the court will discharge the order and permit the complainant to amend his bill upon

[a] Beames' Ord Chan. 11, and *vide* 3 Ves. & Beames, 171, where the alteration in the practice is noted; and 2 Madd. Chan. Prac. 384, note (1).

[b] 2 Ves. Jun. 387. Barnard, 287.

[c] 1 Atk. 286.

[d] 15 Ves. 291.

payment of costs; [a] and in such case he must take care to amend within a reasonable time, or the order will be considered as a nullity. [b] The latter, namely, the order to dismiss subsequent to the filing of the replication, is only obtained upon special motion; and here, if the complainant undertakes to "speed his cause," he is given another term only, and not *the vacation following*; [c] but if he still neglects to follow up his suit, the defendant may, upon special motion, on the production of the former order, together with the six-clerk's certificate, obtain a peremptory order for the dismissal of the bill, with costs, *unless* the complainant appears and undertakes to give rules to produce witnesses, and to pass publication in the course of the ensuing term, and to set down the cause for hearing in the term after; so anxious is this court not to send any suitor away without redress, even where his own negligence is the cause. But if the above condition is not complied with, the cause stands dismissed out of court without further motion. A complainant (though only a co-plaintiff) [d] may move to dismiss the bill, so far as he is concerned, at any period of the suit, upon payment of costs. [e]

[a] 16 Ves. 204. 3 Ves. & Beames, l. 2 Atk. 604.

[b] 1 Ves. & Beames, 523.

[c] *Vide* 2 Madd. Chan. Prac. 387, note (b).

[d] 13 Ves. 167.

[e] 1 Cha. Ca. 40. 3 Atk. 558.



## CHAPTER X.

## Of the Examination of Witnesses.

91. The *subpœna* to rejoin, or rejoining *gratis*, puts the cause completely at issue between the parties; and to prove the facts alleged by the pleadings on each side is the next concern. This is done by examination of witnesses, and taking their depositions in writing, according to the manner of the civil law; and which depositions are kept secret until the time for examining witnesses has expired; at which period either party may give a rule to have the examination disclosed, which is called "*passing publication*." Our present inquiry, therefore, will be with regard to the examination of the witnesses, and the manner of taking their depositions.

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SECTION I.*Of the Examination by the Examiner.*

92. The examination takes place in either of two ways, *viz*: at the examiner's office, if the witnesses reside within the circuit of twenty miles from town; or before commissioners specially appointed, for such as live beyond that distance. Anciently all examinations were taken by the master of the rolls in person, upon the allegations of the bill, and the answers of the witnesses were set down in writing; but afterwards, as the business of the court increased, and the chancellor began to depute the master of the rolls to hear some of the minor causes, the business of examination fell into the hands of two of the sworn clerks of the master of the rolls, thence called examiners. It was thought, however, too much to entrust them with the discretion as to what questions were proper to be put; and from that time forward the custom arose of framing and filing *interrogatories* in writing, on behalf of

either party, which, and which only, are to be proposed to, and asked of, the witnesses in the cause. [a] This being an important branch of the proceedings, great care and skill being required that the interrogatories be short and pertinent, and not leading (as otherwise the depositions upon them will be suppressed), at the same time that they be adapted to sustain the case of the party on whose behalf they are filed, they must be drawn up and signed by counsel.

93. The manner of examining the witnesses upon such interrogatories has been regulated by a variety of rules and orders of the court, issued from time to time, the main object of which is to provide that the examination shall be fair and impartial, and without allowing any undue advantage to be taken on either side. [b] When either party chooses to examine witnesses, therefore, in town, the interrogatories, properly engrossed, are first to be left with the examiner, at his office, which is the mode of filing them; and the clerk in court enters a rule for the other side to produce witnesses. When a witness attends to be examined, he is taken before a master and sworn; and the "*jurata*," with the date of it, is inscribed on the interrogatories, and signed by the master. The witness is next produced in person, previous to his examination, and shown at the seat of the adverse clerk in court, in the six-clerk's office; and a note in writing, of his name and place of abode, left with the clerk. This is with the view, as well to give an opportunity to the other side of cross-examining the witness, as also to ascertain and ensure his personal identity. Being thus sworn and produced, he returns back to the examiner's office, and is there examined privately; none being present but the witness, the examiner, and his clerk. Each interrogatory is to be proposed to him "*seriatim*;" and he is not, on any account, to be permitted to read over, or hear read, any other interrogatory, until the one in the course of examination be concluded, and his deposition taken thereto. Scandalous and impertinent answers are not to be taken down, and

[a] *Vide* Jud. Author. of Master of the Rolls.

[b] Beames' Ord. Chan. 188, *et seq.* 71, 262.

such answers would be suppressed after publication. After the witness has been fully examined, the depositions are read over to him, which he is then at liberty to amend or alter; he next signs them, when, and not before, the examination is complete, and good evidence to be read at the hearing.

**94.** In like manner, all letters, notes, deeds, *copies* of records, and such like, when proved by the examination, may be read at the hearing; and such are technically called *exhibits*; because, though they stand proved in the depositions, they must be *exhibited* in court, if the party will have any benefit of them in evidence. Sometimes *exhibits* are allowed to be proved *viva voce* at the hearing, provided no cross-examination be necessary; [a] but then there must be an order obtained for that purpose, and the *exhibits* to be proved must be specified in the order. [b] There is an exception, however, with regard to a will, which cannot be thus proved; because the due execution of it may come in question, which cannot be examined to "*ore tenus*" in court. [c]

**95.** If the opposite party thinks proper to cross-examine any witness who is produced, he may do so, having filed cross-interrogatories, and left a note with the examiner for that purpose; and then the witness is to be examined on the cross-interrogatories, immediately on his direct examination being closed; otherwise the party, whose witness he is, is not bound to produce him again.

**96.** Witnesses in this court are compelled to attend by the same process as in the common law courts; namely, the "*sub-pœna ad testificandum*;" and in default of attendance, upon certificate of the interrogatories being filed, and affidavit of personal service, the court will order the witness to appear within four days to be examined, or commit him to the Fleet. [d]

[a] 2 Ves. 479, 480. 1 Atk. 445.

[b] In the Curs. Canc. 306. it is said, that this order must be special; but *vide* Newl. 285, *contra*. It is also said, that letters and notes cannot be proved *viva voce*.

[c] 3 P. Wms. 93. 1 Atk. 203.

[d] Hinde, 329. 12 Ves. 201.

No witness can ever be examined twice to the same point; but new interrogatories, either for the same or different witnesses, may be filed in *the examiner's office*, at any time before publication is passed; but if it be the same witnesses who are required to be examined on fresh interrogatories, an order must be obtained for that purpose. Sometimes, though rarely, a witness is permitted to be re-examined on the same interrogatories, to give him an opportunity to answer more fully and precisely to some point; but in such case, he is strictly confined to the particular point, and must not be examined at large. [a]

97. A defendant also may, in some instances, be examined as a witness; that is, provided it be only to points in which he is not concerned in interest; [b] consequently, if he be examined at the instance of the complainant, the complainant cannot have a decree against him on such matters as he has been examined to. [c] Liberty to examine a defendant must be obtained by order, which is of course, and which always contains a clause, saving just exceptions to the other side. Nor is it the complainant alone who has the power to examine a defendant as a witness; but a co-defendant may do so likewise, under the same restrictions; otherwise, if the being a party were to exclude the testimony, any man might deprive another of his defence, by making his most material witness a co-defendant. [d] It is different, however, in the case of complainants, one of whom cannot examine another, both because they stand voluntarily in that capacity; and because they are all so far interested, at least, as to be liable for the costs, if the suit miscarry. Yet a defendant may examine a complainant, if he consent to have interrogatories put to him. [e]

98. If interrogatories be improperly exhibited to a witness he must demur, [f] and such demurrers are set down,

[a] 13 Ves. 280.

[b] 2 Ves. & Beames, 401.

[c] 2 Dow. Rep. 153. 1 Cox, 344. Ambler, 583.

[d] 4 P. Wms. 596. 3 P. Wms. 288. 16 Ves. 219.

[e] 15 Ves. 173.

[f] 2 Atk. 593. 1 Madd. Rep. 265.

like other demurrers, for argument. but are held to very strict rules. [a] A witness, however, cannot demur to being examined because the question is not pertinent to the matter in issue. [b] He may object, also, to any question which can have a tendency to criminate him or render him liable to any penalty. [c] And the mode of proceeding in such latter case is to state in the depositions that to such an interrogatory the witness refuses to answer, and the reason of his objection.

99. If a witness, residing within twenty miles of town, be in prison, or incapable, from sickness, of attending, one of the examiners and the sitting master will go to him to swear him and take his depositions; previous notice being given of the time and place to the other side, to give them the opportunity of cross-examining.

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## SECTION II.

### *Of the Examination by Commissioners in the Country.*

100. In a country cause, that is, where the witnesses reside about twenty miles from town, the examination of witnesses is by *commission*, issued under an order of course obtained for that purpose, and which in general constitutes part of the order for a *subpœna* to rejoin. The application in that case is for "a *subpœna* to rejoin, returnable immediately; and that service on the defendant's clerk in court may be deemed good service, and that the complainant may be at liberty to take out a commission for the examination of witnesses, returnable without delay, with liberty to execute the same in term time, with the usual directions." Those directions are, "that the defendant's clerk in court may, in four days after notice thereof, join in commission and strike commissioner's name with the complainant's clerk in court; or in default thereof, that the complainant may be at liberty to take out a commission, directed to his own commissioners." [d]

[a] Mos. 195. 2 Atk. 524. 2 Chan. Ca. 208.

[b] 1 Vern. 165.

[c] 16 Ves. 239.

[d] Hinde, 294.

**101.** The commission for examining witnesses is, in many respects, similar to that for taking the answer of a defendant, already described. The manner of joining in commission and striking commissioners' names, is as follows: The clerk in court of each of the respective parties who join in commission writes the names of four persons, as instructed by his client, in a book kept for that purpose; and then, each side being prepared and notice given, the commission book is produced, and two names out of each four are alternately struck out by the opposite parties, the remainder being the persons to whom the commission is directed. The commissioners ought necessarily to be indifferent persons, and if it be discovered that any other has been appointed, the court, on motion, or the master of the rolls, upon petition, will order the party to name commissioners "*de novo*;" otherwise the commission to issue "*ex parte*." [a]

**102.** The complainant, unless by his own default, has always the carriage of the commission; and consequently his clerk in court makes it out, and, when sealed, sends it to his client to be executed. Sometimes a duplicate of the commission is made out for the defendant, if he suspects that the complainant has any object in delay. Also, if the defendant's witnesses reside in a different part of the country, he may have a commission of his own; but in such case the opposite party may join in commission and examine, or cross-examine, what witnesses he thinks proper. He who has the carriage of the commission must give fourteen days' notice, [b] under his commissioner's hands, of the time and place where the commission will be executed, to all the parties who join in such commission. If it be not a joint commission, no notice is requisite.

**103.** The commissioners having met according to notice, proceed to open the commission. The commission being the authority under which they act, must be first produced and

[a] Hinde, 304, 305.

[b] This fourteen days' notice was the ancient notice of a trial in a cause at law, and from thence taken. Vide Gilb. For. Rom. 128.

read. commanding them, *any two* or more of them, to examine on interrogatories, all witnesses to be exhibited before them on both sides. To this commission a label is annexed, containing the names of the persons to whom it is directed, with the time of its return, and also the form of oath to be administered to the commissioners and their clerks, who must not be the clerks or agents of either party. The oath prescribed (by which the commissioners and their clerks are sworn to keep the depositions secret) being administered, the interrogatories for each party respectively examining witnesses, are produced, and at the foot of each schedule of them the commissioners present subscribe their names. Formerly, the interrogatories were annexed to the commission, and so they are now supposed to be; for which reason no new interrogatories can be put, either to the same or fresh witnesses, under a commission, without the special leave of the court. It is otherwise, however, as we have seen, when the depositions are taken by the examiner; because examinations by him are as if by the court itself, whose immediate officer he is. The form of examination and cross-examination by the commissioners, is the same as that before the examiner. The acting commissioners sign their names to each skin of parchment upon which the depositions are engrossed, and each witness signs his own depositions. All exhibits are likewise indorsed by the commissioners present, without which they could not be used at the hearing. The commissioners may adjourn both in time and place, but if at any time they depart without adjournment, it is construed to be a refusal to act longer, and the commission is lost, unless the parties will consent to take new notice. If a new commission be required, through the neglect or default of the complainant or his commissioners, the defendant will have the carriage of it.

**104.** The examination being concluded, the depositions, as engrossed, together with the interrogatories, are annexed to the commission, and the whole carefully folded and sealed up, with an indorsement by the commissioners, specifying the execution. In such state the commission is to be delivered

to the clerk in court who had the custody of it, either by a special messenger, to whom the commissioners personally entrust it and who must make oath before a master that it has not been opened or altered since he received it, or by one of the commissioners in person. It then remains in the six-clerk's office, unopened, until publication is passed, in like manner as depositions taken by the examiner are to be safely and privately kept by him till publication; and if they be not in both cases thus kept and entered as of record by the proper officer, they are void and not to be made use of either in this court or at law. [a] The paper drafts of the depositions (which, for that purpose, are also signed by the witnesses respectively) are in like manner kept by the commissioners, lest by any mischance the commission roll should be lost.

**105.** The commission is usually made returnable "*without delay*," which return, if the commission be made out in term time, holds to the first return of the ensuing term; if made out in the vacation, to the last return of the subsequent term. It may, however, be made returnable on any general return day. [b]

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### SECTION III.

#### *Of Commissions to Examine Witnesses Abroad.*

**106.** The residence of witnesses beyond sea, or out of the jurisdiction of the court, whose testimony will be material to some of the parties in the suit, frequently occasions an application for a commission to examine witnesses *abroad*, and if foreigners, in their own language, and sworn according to the custom of their country, in the most solemn manner. [c] The application for this species of commission must be supported by an affidavit, naming the place of residence of those witnesses, and stating that the party cannot safely proceed to a hearing without their testimony. [d] The proceed-

[a] Beames' Ord. Cha. 221.

[b] Hinde, 302.

[c] 1 Atk. 21.

[d] 2 Bro. C. C. 272.



ings under such commission are in all respects similar to those of an ordinary commission, with this exception, that it is usual to name more than four commissioners, to prevent disappointment; and that, "*ex necessitate rei*," in case of a joint commission, notice of executing it to two of the opposite party's commissioners, or to an agent appointed for that purpose, must be substituted for notice on the party at home. The return, which is in this case also generally "without delay," should be regulated by the distance and a reasonable time allowed. If the depositions in such case are taken in a foreign language, they are to be translated by a sworn interpreter. [a]

It is common to file a bill for the express purpose of having a commission to examine witnesses abroad who are necessary to the defence or support of a trial at law, which is a species of bill of discovery; and in case of being filed by the defendant at law, ought likewise to contain a prayer for an injunction to stay proceedings at law. The order for a commission to examine witnesses abroad may be obtained before answer. [b]

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#### SECTION IV.

##### *Of the Examination of Witnesses de bene esse.*

**107.** We have seen that the regular stage for the examination of witnesses is, after the *subpoena* to rejoin; but in urgent cases, as where either party has a material witness who is dangerously ill, [c] or so old as to be in danger of dying before his regular examination can take place; [d] or if the witness is going abroad, or is the *only* witness who can prove the case; [e] and in general, wherever a defect of justice might probably ensue from delay, the court will grant an

[a] 2 Cox, 288.

[b] Cooper, 222.

[c] 8 Ves. 31.

[d] Ambl. 65. 13 Ves. 261.

[e] 3 P. Wms. 77.

order, grounded on an affidavit stating such facts, to examine the witness *before* issue joined; but conditionally, that is, that the depositions so taken may be used only in case the witness cannot afterwards be examined at the regular time. This is called an examination "*de bene esse*." The complainant may have this order at any time after the service of *sub-pœna* to appear and answer; the defendant, not until he has answered. [a] Notice of the motion must be given in all cases, except where the witness is dangerously ill, or of the age of seventy. [b] But notice of the examination, or executing the commission, is indispensable, that the opposite party may avail themselves of the opportunity of cross-examining. [c] In this instance, also, a bill is frequently filed for the purpose when the testimony is required in a suit at law.

The order to examine witnesses "*de bene esse*," gives liberty to examine such and such witnesses *nominatim*, and contains a clause saving just exceptions. This order is to be construed strictly, and authorizes the examination only of the persons named therein. All the formalities requisite in the examination of witnesses in chief must be complied with in the examination "*de bene esse*," whether at the examiner's office or by commission in the country. Depositions taken "*de bene esse*" cannot be published without an order made on producing and proving the register of the witness's death, or an affidavit that he is beyond sea and has not been heard of for a considerable time, for such depositions are only to be used *provided* the witness cannot be examined in chief.

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## SECTION V.

### *Of Examinations in Perpetuam Rei Memoriam.*

**108.** Precisely of the same nature is the bill to "perpetuate the testimony of witnesses," under the like circumstances,

[a] 1 Dick. 92. 2 Fowl. 130.

[b] 8 Ves. 31.

[c] 4 Bro. C. C. 540

to a disputable fact, although no suit is depending, either at law or equity; for it may be, a man's antagonist only waits for the death of some of them to begin his suit. With this difference, that here the parties go regularly through the proceedings, up to publication. The depositions even in this case, however, are not ordinarily to be published while the witnesses live, unless by consent of parties, or upon oath that the complainant has some trial at law, wherein he shall need them; and then, if the witnesses are unable to travel, or abroad, or otherwise incapable of giving their testimony *viva voce*, "the *exemplifications*" [a] may be given in evidence in any other court, by order of this court.

This species of examination, which is termed "*in perpetuam rei memoriam*," is most frequent when lands are devised by will away from an heir at law. The devisee in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir; and sets forth the will "*verbatim*," suggesting that the heir is inclined to dispute its validity; and then the defendant having answered, they proceed to issue as in other cases, and examine witnesses to the will, and pass publication. After which the cause is at an end, without proceeding to any decree; no relief being prayed by the bill. This is what is usually meant by proving a will in chancery.

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## SECTION VI.

### *Of Objections to the Credit or Competency of the Witnesses.*

109. Witnesses in this court may, as at law, be objected to on the ground of *competency* or *credit*. The manner of impugning the *credit* of a witness is by "*exhibiting articles*" as they are called, specifying the objections, which articles are annexed to the depositions, and filed with them in the respect-

[a] An Exemplification is the copy or *example* of a matter recorded or enrolled—as decrees, letters patent, depositions, etc., and is made out or copied from the enrollment thereof, and sealed with the great seal. *Curs. Can.* 375.

ive offices. The proper time for taking advantage of an objection as to *competency*, is when the witness is produced to be examined, when a cross-interrogatory may be framed and put to him on that point; and if the witness untruly denies the fact which creates his incompetency other witnesses may be examined to that point, in order to discredit him. [a] If, however, the party is not acquainted with the ground of objection in sufficient time, the court will allow an examination to *competency* even *after* publication; but the way to apply for this is not by exhibiting articles, but by motion for leave to examine to this matter, upon a foundation of ignorance at the time of the examination. [b] And if the party has omitted to cross-examine a witness as to his interest in the suit he may, *before* publication, move, on affidavit, for leave to re-examine the witness as to the fact of interest. [c]

With regard to credit, articles may be exhibited either before or after publication, [d] and on certificate of their being filed, an order will be granted that the party be at liberty to examine witnesses on general interrogatories, as to the credit of the person whose testimony is sought to be impeached, and as to such particular facts only as are not material to what is in issue in the cause. [e] If a commission be required for this purpose, it will be directed to the former commissioners. [f] The other party is to support the credit and reputation of his witnesses, and may examine accordingly "*toties quoties*;" their depositions must be published as in other cases, and the point is decided, with all other questions of evidence, at the hearing. A person is not allowed to discredit his own witness. [g] After a cause has been set down is too late to examine to credit. [h]

[a] 3 Atk. 643. 8 Ves. 326.

[b] 3 Atk. 643.

[c] 2 Madd. Rep. 322.

[d] 19 Ves. 127.

[e] 8 Ves. 324. 9 Ves. 145.

[f] 9 Ves. 146. 1 Ves. & Beames, 153.

[g] 8 Ves. 327.

[h] 3 Atk. 522.

## CHAPTER XI.

## Of Publication and its Incidents.

## SECTION I.

*Of Rules to pass Publication, and of enlarging Publication.*

**110.** The next object of our inquiry is publication and its incidents. We have already seen that after the return of the *subpœna* to rejoin, the complainant gives the opposite parties a rule to produce witnesses, unless he requires a commission; in which case it is made part of the order for the *subpœna*, that the defendants should join and strike commissioners' names in four days after notice. [a] If the defend nt does not join in commission, or does not examine any witnesses under it, still the complainant must, on the return of the commission *ex parte*, give him a rule to produce his witnesses, at the expiration of which (which is always in a week) he gives another rule for a day to show cause why publication should not pass. Upon the return of a joint commission, where both parties have examined witnesses in chief, this latter rule is alone requisite; and either party, who has examined, may give rules to the other. [b] But as the complainant is the person principally interested in the proof, in order to establish his claim, it is his right first to give rules for publication, as well as to have the carriage of the commission; and

[a] *Vide ante*, p. 91.

[b] A *rule* signifies a particular *order of course*, founded upon some general order or the common course of the court, touching the ordinary proceedings in a cause, and which is entered and issued without either petition or motion. All rules are to be entered in the common book called the House Book; and on entering thereof, notice shall be from time to time given to the under-clerk on the other side, that is towards the cause, that so the client may not be surprised. And note, rules are to be entered in term only. *Curs. Can.* 326.

the defendant cannot give a rule to pass publication, unless the complainant has been in default one term after the cause is at issue. [a] If, on the day appointed, no good cause be shown to the contrary, publication passes, and the sworn clerk or examiner in whose custody the depositions remain, is at liberty to give office copies of them to any of the parties applying. A copy of the rule to pass publication, should be served on the examiner, or his deputy, to authorize him to publish such depositions as were taken by him. The clerk in court has a notice in writing given him by the adverse clerk, who enters the rule.

Publication may also pass by *consent* of both parties, signified by such consent being entered in the rule book, and signed by the respective clerks.

111. All rules, it is to be observed, must commence and expire within the term. But, as no witnesses can ordinarily be examined after publication once passed, on account of the manifest danger of subornation of perjury, (and even if the examiner be only served with an order, whereby publication is to pass on a certain day, he cannot afterwards examine any witnesses), [b] it becomes a frequent subject of application to the court, to enlarge the time of publication beyond the limitation of the rule or order. This is necessary where either party has material witnesses to produce, who could not be examined in time. As soon as the complainant has given a rule to pass publication, he may set down the cause for hearing; but by the rule of the court, no hearing can take place the same term in which publication passes, unless by a special order. [c] When, therefore, an application is made on the part of the defendant to enlarge publication, the order will be granted conditionally, not to hinder the complainant from setting down his cause in the meantime, and such order is of course. But if the cause has been set down, and the *subpœna* to hear judgment has *not* been served, that fact must be stated

[a] 1 Dick. 84.

[b] Gilb. For. Rom. 145.

[c] Beames' Ord. Chan. 319.

by affidavit, and in such case notice of the motion must be given.

**112.** The court will, even under special circumstances, enlarge publication after the *subpœna* to hear judgment has been served, but always so as not to interfere with the hearing, except where the party who sets down the cause himself makes the application; in which case he must move to adjourn the cause, and serve the order thereon on the adverse clerk in court, before the day on which the cause is set down for hearing, but the circumstances must be very special to warrant an application to enlarge publication beyond the hearing. [a]

**113.** All orders to enlarge publication should be obtained and served, as well upon the adverse clerk in court as upon the examiner, on or before the day on which publication actually passes in the cause. As this court is extremely solicitous that ample justice should be done, and that no mere forms, however advantageous, should obstruct its course, it will grant an order further to enlarge publication, even after the rule for passing publication has expired; but in such case it requires an affidavit from the party, the solicitor, and clerk in court, that they have not seen, read, nor been informed of the contents of the depositions taken in the cause, and that they *will* not, till publication is duly passed by further order; because, by such affidavit, the spirit of the rule is preserved. [b] This order, supported by the above affidavit, is also of course, before the cause is set down, subject, however, to the same conditions as already mentioned; and when granted, the opposite party is at liberty not only to cross-examine, but to examine witnesses at large, without any motion for that purpose. [c] In most cases, too, the court will enlarge publication, and give a party an opportunity of examining witnesses, even though publication should have been already enlarged by a precedent order, if any reasonable ground can be shown upon affidavit

[a] Hinde, 385.

[b] Gilb. For. Rom. 146. 13 Ves. 512.

[c] 2 Vern. 253.

of the facts, and that the witnesses are material. (a) This is a special motion, and requires notice.

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## SECTION II.

### *Of the Proceedings upon Cross Bills.*

**114.** With respect to cross bills, which, as we have already seen, are filed by a defendant in a cause where he has either some relief to pray or discovery to seek against the complainant, or any of the co-defendants, this is the proper stage to stay the proceedings, so that both causes may come on to be heard together; or at all events, that the defendant in the original suit may have the benefit of full proof in his cross cause; the rule of the court being not to stay proceedings generally till the answer comes in to the cross bill, but only to stay publication. (b)

**115.** As soon as the original bill is filed, the defendant may forthwith file his cross bill; and it will be highly advantageous to do so before he answers, for a reason we shall see further on. The defendant to a cross bill being already in court by the original bill, service of process on his clerk in court is good service. (c) The complainant, however, in the original cause has the priority, and cannot be compelled to answer the cross bill until the defendant has put in his answer to the original bill. If, indeed, he amends the original bill in material points subsequent to the filing of the cross bill, the amended bill will be considered as a new bill, and he thereby loses his priority. (d) But in the ordinary case, he may proceed with the original cause in the regular course up to publication, notwithstanding that he may not have put in his answer to the cross bill. In this event, if publication were to pass, it would cause a serious inconvenience to the defendant, because he could not after-

(a) Hinde. 383.

(b) 1 Atk. 221-291.

(c) 4 Bro. C. C. 478.

(d) 2 P. Wms. 435. 2 Atk. 218. 3 Atk. 724. 2 Cox, 371.



wards examine witnesses to the same points which had been in issue in the original cause, in pursuance of the rule so often stated; and yet, until the answer to the cross bill came in, he could not know in what manner to frame his interrogatories, or what defect of proof it might be necessary for him to supply. Under such circumstances, therefore, the court, on application, will enlarge publication until a reasonable time (usually a fortnight) after the complainant shall have put in his answer to the cross bill, (a) and where the cross bill has been filed in due time, before the cause has been proceeded with (that is, *before* the original answer), the motion to enlarge publication is of course; but it is by no means so if the cross bill has been filed *after* answer, for then there must be a *special* application to account to the court for the cross bill not being sooner filed; otherwise, a cross bill might be resorted to merely for the purposes of vexation and delay. (b)

116. A defendant may file a cross bill *after* publication; but in such case, or where he does not stay publication in the original cause, he must proceed to hearing on the depositions already published; but any of the depositions in the cross cause, not relating to the matters in issue in the original cause, may be read. (c) An answer to a cross bill cannot be used as part of the answer to the original bill; but the defendant having obtained the discovery, should move for leave to file a supplemental answer.

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### SECTION III.

#### *Of the Publication of Depositions taken de bene esse, and of Suppressing Depositions.*

117. The fundamental rule with regard to depositions taken "*de bene esse*," is that they are not to be published but where there is a moral impossibility to have an examination

(a) 1 Atk. 21-291.

(b) 2 Ves. 336. 16 Ves. 93.

(c) 3 Atk. 500.

in chief. (a) This fact must therefore be made out to the satisfaction of the court, on affidavit, and consequently it requires a special application grounded on such affidavit, and an allegation that publication has passed in the cause to have the depositions in this case published. If, when they are published, any irregularity is discovered, the proper course is immediately to move to discharge the order for publication, upon notice to the opposite party; and the court will decide, upon hearing the facts alleged on both sides, verified by affidavit; and should the order be discharged, the depositions taken "*de bene esse*" will be of no avail. (b) But it will be too late to make objections for irregularity at the hearing of the cause, because such objections are preliminary and ought to be decided beforehand. (c) The credit or competency of the witness may, however, be excepted to, as in an examination in chief, and such exceptions urged at the hearing, for the order to examine a witness "*de bene esse*" always contains a clause that it be without prejudice to any exception which may be made at the hearing of the cause.

118. When any irregularity has occurred in taking the *ordinary* examination, the course is not to discharge the order for publication, but to have the depositions *suppressed*; and the reason of the difference between the mode of proceeding in this case and that of depositions taken "*de bene esse*," is that in the former instance, although the depositions be suppressed, the court may see reason to relieve the party by allowing him to have his witness examined a second time before the master; (d) but where the examination "*de bene esse*" has been irregular, the witness being dead, no remedy can be applied and the depositions are wholly lost.

119. After publication, therefore, has passed, the first care of either party must be to look to the interrogatories and depositions, to see that they have not been improper, as that

(a) 2 Ves. 337.

(b) 2 Atk. 189.

(c) Hinde, 390.

(d) 1 Eq. Ca. Abr. 232 Ambl. to 585.

the interrogatories are not leading. or that neither they nor the depositions are scandalous *and* impertinent. (a) If the party, on perusing them, is advised that such objection lies, or that there is any other apparent incorrectness in the proceedings at the examination, it is a motion, of course, (b) to refer them to the master for inquiry, who gives his opinion thereon in the form of a certificate, but which, nevertheless, may be excepted to like other reports; but the court will not refer interrogatories and depositions for impertinence alone, without scandal. (c) If the irregularity complained of be obvious on the face of the examination, or if it be certified by the proper officer *and* clearly substantiated by the affidavit of the party injured, the depositions will be suppressed in the first instance, on motion, without a reference to the master. On such depositions the clerk in court indorses the word "*suppressed*," (d) to prevent their being read at the hearing; and no copies of any depositions whatever can be received in evidence unless authenticated by the signature of the officer in whose custody they have been.

(a) 3 Ves. Jun. 189.

(b) 12 Ves. 201.

(c) 19 Ves. 113.

(d) 15 Ves. 280.

## CHAPTER XII.

## Of the Hearing.

## SECTION I.

*Of Setting Down a Cause, and the Subpœna to Hear Judgment.*

**120.** The pleadings being now concluded, and the trial of matters of fact at an end, by the publication of the depositions, the next business is to obtain the judgment of the court on the points at issue, and its authority, by the final sentence or decree. For this purpose the cause must be *set down for hearing*, and process of *subpœna* served upon the opposite party, to attend and hear judgment; for the court will not make its decree in the absence of any of the parties who are to be affected by it, unless after being duly cited they neglect to appear, which is a sort of voluntary abandonment of the cause.

**121.** In order that the parties may have ample time to prepare for the discussion at the hearing, it is a standing rule, which can only be departed from under very special circumstances, that the cause is not to be set down for the same term on which publication passes. (a) If, however, the complainant does not then set it down, it may afterwards be done "*ad requisitionem defendantis*;" for the court will not allow a cause at this advanced stage to be dismissed for want of prosecution merely, and therefore gives the defendant the privilege of bringing it to a hearing on the complainant's default; (b) and in injunction causes the defendant is at liberty to apply for setting down the cause the term next after publication

(a) For. Rom. 152. Beames' Ord. Chan. 337.

(b) Beames' Ord. Chan. 337.

hath passed. The manner of setting down a cause is by entering the title of the cause and the object of the suit in the cause-book, which is kept by the register. The six-clerks claim a right to set down a certain number of causes in each term, to be heard before the lord chancellor (which now includes the vice chancellor) or master of the rolls, as the party applying thinks proper. When the number to which they have a right is completed, the remaining causes must be set down with the register, upon producing a certificate of the pleadings being filed; and, if there has been a rule to produce witnesses, also that publication has been duly passed. These causes have priority according as they stand in the book, and the register makes out a list of the twelve causes next in rotation, called the *paper of causes*, on the day preceding the hearing. But as there is a day in term appointed for hearing *short causes*, viz: such as are either of course, or involving little difficulty, it is usual to advance such causes, upon counsel's certificate, so that they may be heard on that day. Causes are also advanced or adjourned, so as that two suits, if they be on the same matter, or between the same parties, as in the case of cross-causes, may be heard together, and the depositions in one cause used in the other, on order obtained for that purpose. There is also a paper of *consent causes*, which are heard before the master of the rolls on stated days. These are causes where the decree is matter of course, and consented to by the parties, the defendants submitting to attend without the service of a *subpœna*, to hear judgment.

122. In all other cases, however, it is essential that the party who sets down the cause, should serve the opposite side with this *subpœna*; for if the cause comes on to a hearing, and he is not provided with an affidavit of service of such *subpœna*, unless the adverse party attends voluntarily, the cause will be struck out of the paper; and if afterwards restored on petition, will nevertheless be placed at the end of the list on the register's book. On the other hand, when the *subpœna* to hear judgment has been duly served, and either party in that case neglects to attend upon the day appointed for hearing the

cause, if it be the complainant who is in default, his bill will be dismissed with costs; if the defendant is not in attendance, the complainant, on reading a word or two of the office copy of the answer, properly signed, takes such decree as he thinks he can abide by, according to the prayer of his bill; but such decree is only "*nisi*," and the complainant must then sue out a *subpœna*, returnable in term (as all judicial writs are), and served at the defendant's place of residence, on one of the family, to show cause against the decree; and in default thereof, such decree is made absolute.

**123.** The *subpœna* to hear judgment is procured on the register's certificate that the cause has been set down, and must be made returnable three days at least before the day appointed for hearing; but if there be not three days in term before the hearing, then the return must be on a general return day; and the label always expresses the day actually appointed. This writ should be served personally; but if the party avoids process, service may be substituted by order obtained for that purpose, on his clerk in court, or solicitor, leaving a copy of the order at the last place of residence of the party absconding. (a) In the case of an *infant* defendant, the service of *subpœna* should be on the guardian "*ad litem*." (b) When the party resides in the country, *i. e.* twenty miles from town, the writ must be served fourteen days before the hearing, except in the short vacation between Easter and Trinity terms, when ten days' notice suffices; as likewise in a town cause, ten days is the time required.

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## SECTION II.

### *Of the Manner of Hearing a Cause.*

**124.** When the day fixed on for the hearing arrives, each cause is called on in the order in which it stands in the paper of causes for the day, and counsel must be in attendance and

(a) 2 Ves. 23.

(b) 2 Dick. 439. 2 P. Wms. 642.

prepared for the argument. As it sometimes happens that counsel are not ready when the cause is called on, the court will grant the indulgence of adjourning the hearing to a stated day, unless any material inconvenience were to arise from it; but in such case the party who applies for such a favor, if the other side does not consent, must pay the ordinary costs of the day; and, in general, the party whose deficiency causes an adjournment of the proceedings, must pay the other side the costs of their attendance.

**125.** The manner of hearing a cause is shortly this: The junior counsel on both sides severally open the pleadings, wherein they briefly state the substance and prayer of the bill, and the nature of the defence; after which the complainant's leading counsel states the case and the points in issue, and submits his arguments upon them to the court. The proofs in favor of the complainant's case are next read, which are the depositions of his witnesses, and the admissions in the defendant's answer; and such *exhibits* as are necessary are produced. If the hearing be on bill and answer only, as the complainant by not replying, admits the answer to be true in all points, it must be wholly read, and no other evidence can be admitted but matter of record. If the court, in such case, does not find sufficient matter confessed in the answer whereon to ground a decree, the complainant will be admitted to reply, on paying the costs of the day within four days after the hearing, otherwise the bill to be dismissed with costs. (a) When the proofs are gone through, the remaining counsel for the complainant address the court on his behalf. The counsel for the defendant then pursue the same course on behalf of their client, and the leading counsel for the complainant replies, which concludes the argument on both sides. The counsel for such parties as have only a secondary or derivative interest in the suit are also heard, if necessary to explain the situation, or protect the interest of those for whom they are concerned.

**126.** When the complainant replies to the answer and serves the defendant with a *subpœna* to rejoin, as by such pro-

(a) Hinde, 416.

ceeding he denies the truth of the answer and puts the defendant on the proof, no part of the answer can be read in support of the defendant's case; but if the complainant read only a part of a sentence in the answer, the other side has a right to read the whole of that sentence, because it may be that the entire context may bear a very different construction from that sought to be given to an extract merely. But, on the other hand, as the defendant will not be allowed the benefit of his answer upon oath at the hearing, if issue has been joined, so the complainant must have the testimony of two witnesses at least, in order to contradict a positive denial in the answer. (a)

**127.** It frequently happens that a suit is deficient for want of proper parties. The time for making such objection is after the pleadings have been opened, and before the merits have been gone into. (b) If the objection be valid, the court will order the cause to stand over, giving the proper directions for adding the parties requisite; (c) and if the objection had been raised by answer, as well as at the hearing, so that the defendant was guilty of no neglect in that respect, the complainant will be ordered to pay the costs of the day. (d) The court will, however, direct the addition of necessary parties at any stage of the proceedings, so as to effectuate the decree, as the decree only binds such as are parties, or persons deriving from them. When the party omitted is essential, it is discretionary with the court either to dismiss the bill without prejudice or to let it stand over, with liberty to amend; because in this latter case, the bill must be radically defective. (e) But the general rule is, that a bill is never dismissed for want of parties merely. An objection, for want of formal parties who might have been named in the first instance, cannot be raised a second time, after the cause has been already postponed on the same ground. (f)

(a) 2 Chan. Ca. 8. 1 Vern. 161.

(b) 3 Atk. 110.

(c) 1 Atk. 289. 2 Dick. 498.

(d) 2 Atk. 14. 3 Madd. Rep. 61.

(e) Vide Gilb. For. Rom. 150.

(f) 3 Atk. 217.



## CHAPTER XIII.

## Of the Decree.

**128.** The court having heard the arguments on both sides, and the evidence by which they are sustained, proceeds then to give its sentence or *decree*. The decree is defined to be the order of the court, pronounced on hearing and understanding all the points in issue, and determining all the rights of the parties to the suit, according to equity and good conscience. (a)

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## SECTION I.

*Of the Decree Nisi.*

**129.** That the defendant may not be concluded, even by his own neglect, without a hearing, we have already seen that the decree is only *nisi* against a defendant who fails to attend, although regularly served with process, to hear judgment. If he, therefore, means to dispute the decree obtained *nisi*, he may apply by petition to the judge before whom the cause was set down to be heard, to have it restored to the paper of causes, which is an order of course, upon payment of the costs incurred by the other party in consequence of his non-attendance. The register will therefore not pass the order, unless there is a certificate shown him of such costs being paid, or of a tender and refusal. But if, on the other hand, the defendant chooses to submit to the decree, or is again in default, the complainant having served the *subpœna* to show cause, and on its return producing the affidavit of service and the register's certificate that no cause is shown, or no order obtained, the decree is made absolute, and the defendant has then no

(a) Hinde, 129.

remedy but by a petition for a rehearing, and cannot on motion discharge the order making the decree absolute. (a)

**130.** In like manner, an absolute decree is never pronounced against an infant in the first instance; but he is allowed to show cause against it any time within six months after he comes of age, because an infant is always under the protection of the court, and there may be collusion or neglect on the part of his guardian, through whom he answers. Such collusion or fraud, therefore, is the chief ground for reversing a decree after he is of age; or he may show error, or make out a new case, not before insisted upon. When, therefore, he comes of age, he is to be served with a *subpœna* to show cause; and before an order is obtained for making the decree absolute he may put in another answer (the answer of his guardian not being binding upon him), make a new defence and examine fresh witnesses. (b) He is not, however, under the necessity of waiting until he is of age to seek redress, but may impeach the decree at any time before it is made absolute, by an original bill. (c)

**131.** The decree "*nisi*" against an infant is made absolute in the ordinary way, on affidavit of service and certificate; but it differs materially from the decree for default of appearance at the hearing, in this, that the former, when drawn up, passed and entered, is in many respects considered as an absolute decree, so as to authorize proceedings under it; for the court having given judgment on the *merits*, if, when the infant arrives at age, he cannot show good cause to the contrary, it is an absolute decree "*ab initio*," and unless there is new matter, fraud, or collusion, an infant is bound by a decree made for his benefit, as likewise his executor, if he dies. (d) But the decree "*nisi*" by default is a mere nullity until made absolute.

(a) 3 Meriv. 598.

(b) 1 P. Wms. 503. 2 P. Wms. 401. 2 Atk. 531.

(c) 1 P. Wms. 738.

(d) 2 Atk. 530. 2 P. Wms. 519. 3 Atk. 626.

## SECTION II.

*Of References to the Common Law Courts under a Decree.*

**132.** It seldom happens that upon the hearing of a cause the court can make a *final* decree in the first instance, for either some point of fact may be strongly controverted by conflicting testimony, in which case this court, sensible of its deficiency in the mode of trial, will send the point to a jury on a "*feigned issue*," or, secondly, the complainant's legal right may be disputed, when the court will direct an action to be brought to try the right, but retain the cause on the equity reserved; or, thirdly, a point of law may arise on which the court may require the opinion and advice of the common law judges, and which is referred to them on a *case stated* for that purpose; or, lastly, there may be accounts to be settled, or interests to be ascertained, or acts to be done, such as the sale of property for the payment of incumbrances, which are the proper subjects for a reference to a master. In all such instances the decree is only *interlocutory*, or, more properly, the court makes a *decretal order* and the cause is again brought on for *further directions*, or on the equity reserved.

**133.** The mode of producing a feigned issue is this: the supposed plaintiff declares that he laid a wager of five pounds with the defendant, in the affirmative of the controverted fact, for example, that A was heir at law to B, and then avers that he is so, and brings his action for the five pounds. The defendant admits the wager, but avers that A is not heir at law to B, and thereupon that issue is joined, which is directed out of chancery to be tried, and the verdict determines the point in question, but it is still discretionary with the court to direct a new trial if it has reason to be dissatisfied with the former verdict. (a) The verdict is certified to this court by the judge before whom the issue is tried, and if the plaintiff neglects to bring it to a trial the adverse party may obtain an order that it should be taken "*pro confesso*." (b)

(a) 8 Ves. 536.

(b) Newl. 352, and the cases there cited.

**134.** When a case stated is sent to a court of law, the course is to move for a "*consilium*" in the court to which it is referred; and the rule being entered, and copies of the case given to each of the judges, the question is argued before them by counsel on both sides; after which they deliver their opinion in the form of a certificate to this court, which generally acts upon their advice. But even here the court is not concluded, but may send the same case to another court of law, or use its own discretion in pronouncing its decree, notwithstanding such certificate of the judges. It is usual to refer to a master, both to settle the form of the issue and to fix the terms of the case; (a) but the court directs in what court of law the feigned action shall be brought, and who shall be parties, or to what court the question of law shall be referred.

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### SECTION III.

#### *Of References to the Master, under a Decree, and of Examinations in the Master's Office.*

**135.** With respect to references to the master, we have already stated all the incidents and forms of proceeding generally, in another part of this work. (b) All that will be necessary, therefore, in this place, is to state some of the peculiarities which attach to references under a decree.

After the decretal order has been passed and entered, the first step is to leave a copy of the title and ordering part of it with the master to whom the cause is referred. If a party is directed by the decree to perform some specific act before the master, he must be served with warrants in the usual manner, as in the case of a summons to appear, and in case of his default, on the service of the third warrant, or if further time has been granted him either by the master or the court, at the expiration of such time application may be made to the court on the master's certificate, to order him to do the act required within a certain time, or stand committed.

(a) 2 Dick. 474.

(b) *Vide ante*, cap. 5, Sec. 2.

**136.** In order the better to enable the master to investigate the matters referred to him, the decree frequently gives him the power of examining the parties or witnesses upon interrogatories; and upon his certifying that a commission is necessary, it is granted by the court, and the master is then technically said to be *armed* with a commission. If the order for a commission be improperly obtained, the course is to move to discharge the order. (a) The depositions taken by a master are kept in his office; those taken by commissioners are filed with the six-clerks, (b) but no publication passes in either case, as their sole use is to assist the master in making up his report, and in this respect they are merely "*ad informandum conscientiam judicis*."

**137.** Where a *party* is to be examined, the interrogatories must be *settled by the master*, (c) and when engrossed, the master signs a certificate of having allowed them, which is filed in the report office, and which consequently may be excepted to. (d) The party to be examined, on being served with the usual warrants, applies at the master's office for a copy of the interrogatories, to which he prepares written answers, called his *examination*, which is then left at the master's office; but if taken under a commission, it must be returned to the six-clerk's office. This examination is for the benefit of all parties interested, who are therefore entitled to take copies. (e) If the examination is conceived to be insufficient, an order must be obtained to refer the interrogatories and examination to the master, and if he reports accordingly, the examinant must, unless he excepts to the report, put in a further examination or be committed. If three examinations are reported insufficient, the party will be committed at once. The same rule holds with regard to costs, as in the case of insufficient answers; but upon an examination being reported insufficient, new interrogatories cannot be added *as of course*, a special ap-

(a) 1 Dick. 377.

(b) 3 Ves. 607.

(c) 17 Ves. 434.

(d) 6 Ves. 458.

(e) 3 Ves & Beames, 176.

plication being required for that purpose; (a) and the reason of this departure from the analogy of insufficient answers is, because the interrogatories for an examination are previously settled and allowed by the master. Neither can the master, without a special order, re-examine a party who had been previously examined. (b) An examination may also be referred, for impertinence; and the report must state in what particular the same is impertinent. (c)

**138.** When it is necessary to examine witnesses in the master's office, they are to be examined either before the master (d) in person or before commissioners in the country, upon interrogatories settled and signed by *counsel*; because the party who requires their testimony knows best how to prove his own case. But to examine a witness who had already been examined in chief, though upon different interrogatories, requires a special order; and in such case the master must himself settle the interrogatories. (e) So, likewise, it is necessary to make a special application for liberty to examine witnesses to the *same* points which had been examined to in the cause. (f) In like manner, the interrogatories for the examination of creditors who come in with their claims under a decree for the administration of assets, are settled by the master, to prevent fraud or collusion.

**139.** When a particular inquiry is directed by a decree, as with respect to a proper guardian, and maintenance for an infant, or of what real estate the testator died seized, and such like, a *state of facts* should be prepared and laid before him in writing, and if it contain scandal or impertinence, it may be referred to the master in the same manner as the pleadings in the cause; (g) for, without such reference, although they are

(a) 3 Atk. 511.

(b) 17 Ves. 434.

(c) 3 Madd. Rep. 246.

(d) 3 Ves. 603.

(e) 13 Ves. 360. 2 Dick. 508, 509.

(f) Cooper, 291.

(g) 18 Ves. 114.

laid before him, he could not certify that they are scandalous or impertinent; as, it is to be remembered, the report is always strictly confined to the order of reference.

**140.** The *state of facts* which is laid before the master under a decree for an account (which is always accompanied with a reference of the accounts), deserves a more distinct consideration, both from its frequency and peculiarity. In this instance, the complainant prepares a statement of the several items which he claims to be entitled, upon *proof*, to charge the defendant with in account. It must be made up, therefore, from the evidence in the cause, the defendant's answer, and schedules; and lastly, if necessary, his examination.

**141.** This statement is called the *charge*; and when prepared, is left in the master's office to be investigated by him; and when allowed, the defendant must then bring in his *discharge*, which contains a statement of payments and disbursements by him, or whatever else may discharge him from the debt made out against him on the other side of the account. For all sums above forty shillings he must produce vouchers, unless it be otherwise directed by the decree, in which case, as well as in the payment of sums under forty shillings, he will be allowed them on his own oath; (a) but it will not be sufficient to swear to his belief only; he must swear to the fact. (b)

**142.** On the same principle as a defendant is not permitted to read his answer in proof at the hearing, so neither can a defendant support his discharge by his answer or examination, unless where the examination states that he received a sum of money, and in the same sentence states that it was paid over *on the same day*; because that is but one transaction, and the same on which the complainant grounded the item in his charge.

**143.** After all the matters have been arranged and the inquiries made which were referred to the master, he proceeds to make his *general* report thereon to the court. The mode of excepting to reports we have already noticed.

(a) 2 Vern. 176.

(b) 2 Atk. 409.

## SECTION IV.

*Of further Directions, and the final Decree; and herein of rectifying the Minutes, and signing and enrolling Decrees.*

**144.** The report, when allowed, or submitted to, is the ground-work of the *final decree* made, when the cause is again heard on further directions. If exceptions have been taken to the master's report, the cause may be brought on, on those exceptions, and for further directions at the same time; in which case a copy of the report, as well as of the decree, should accompany the petition. Either party may set down the cause for further directions, by petition, which (the order being served on the adverse clerks) is entered in the cause-book, and comes on in its order, on one of the days appointed for that purpose. But as it usually requires a considerable time finally to arrange all the matters referred to the master, preparatory to the decree; and as some of the parties might be materially inconvenienced by the delay, that difficulty is obviated by allowing the master to make a *separate* report upon such points as demand a speedy decision; and this liberty is given him either by the terms of the former decretal order, or may be obtained afterwards on motion of course, by any of the parties who desire it.

**145.** On the coming in of the separate report, the party whose interest is concerned, must then have the cause set down for *further directions*, by petition for that purpose; and thereupon such further *decretal order* is made as the urgency of the occasion may demand—as the allowance of maintenance for an infant, the payment of a gross sum of money to a person who appears to be entitled *by the master's report*, and the like. In such cases it would not be sufficient to make the application by way of motion or petition, for the office of a *cause petition* is only to carry a decree or decretal order into execution—as to have money paid out of court to a party who is entitled *under the decree*—but to add to the decree, the cause must be heard on *further directions*: to modify, alter, or reverse it in the minutest particular, there must be a *rehearing* before it is en-



*rol'ed*; after *enrollment* the party is compelled to resort to a *bill of review*.

**146.** When the decree is pronounced the minutes of it are taken down by the register, and if any mistakes appear and the register cannot consistently with his duty make the alteration required, an application may be made to the court, either by motion or petition, *to rectify the minutes*. And the same incidents hold as to settling the minutes as have already been noticed under the head of "Interlocutory Orders." (a) Even after the minutes are passed the court will, on motion, allow a usual direction to be added, which had been omitted by mistake. (b) .

**147.** All decrees, like interlocutory orders, must be regularly *drawn up, passed and entered*; and the rule with regard to the time for entering interlocutory orders extends also to the entering and enrolment of decrees and dismissions, namely, decrees made in Michaelmas and Hilary terms are to be entered before the first day of the Michaelmas term following; and all of Easter and Trinity terms, before the first day of Easter term following; otherwise there must be an order to enter them *nunc pro tunc*, which is of course, when applied for in reasonable time. (c)

**148.** But decrees are not perfected till *signed* by the chancellor and *enrolled*. If they be pronounced by the master of the rolls, or vice chancellor, they are not considered as the act of the court until they have the chancellor's signature; and even when pronounced by the chancellor himself, they are merely regarded as declarations of his opinion, which may be changed or reversed upon a rehearing, until they have received the final sanction of the court by being *signed and enrolled*. *Enrolment* is the engrossing of the decree on parchment, and leaving it with the proper officer, which may be done by either party; and until this last act is performed the

(a) *Vide ante*, p. 52.

(b) 7 Ves. 293. 12 Ves. 456.

(c) Beames' Ord. Chan. 205; and *vide* Hinde, 432.

decree is only "*in fieri*," and may be altered at discretion; and therefore the signing and enrolling of decrees with expedition is not encouraged, because, if subsequently a mistake is discovered, it occasions the expense of a bill of review, or an appeal to the House of Lords. For this reason a party is at liberty, without assigning any cause, to enter a "*caveat*," which will prevent the enrolling for a month or twenty-eight days from the time of presenting the *docket* of the decree to the lord chancellor to be signed, and notice given by the chancellor's secretary to the clerk on the other side. (a) The *docket* is a draft copy of the decree, from which the enrolment is taken, and must be carefully compared with the several pleadings and records which it recites, by the six-clerk who prepares it, and who certifies its correctness by his signature on the last sheet, previous to its being presented to the lord chancellor. (b) Sometimes, when a mere clerical error has crept into the enrolment, or the decree has been enrolled by surprise on the other party, (c) and *the merits not gone into*, (d) the enrolment has been ordered to be opened to let in a rehearing and to save the expense of a bill of review; but this is very rare, and the circumstances must be very strong to warrant such an application.

149. The enrolment is that which gives the decree its full efficacy, previous to which it has only the force and effect of an interlocutory order; wherefore the decree is not pleadable until after it is enrolled. (e) When the decree is enrolled it is left with the record keeper for safe custody, and it cannot afterwards be reversed but by appeal to the House of Lords within five years, or by bill of review, brought within twenty years from the pronouncing of the decree. (f)

(a) 1 P. Wms. 608. 1 Ves. 328.

(b) Beames' Ord. Cha. 112.

(c) 1 Vern. 131.

(d) 16 Ves. 115. 1 Ves. 205. 14 Ves. 231.

(e) 3 Atk. 809.

(f) 1 Bro. Parl. Ca. 95.

## CHAPTER XIV.

## Of Rehearing and the Bill of Review.

## SECTION I.

*Of the Caveat, and Petition for a Rehearing.*

**150.** When a party is dissatisfied with a decree, his first step should be to enter a "*caveat*" to prevent the enrolment. He may then apply by petition to the judge before whom the cause was heard, for a *rehearing*, or to the chancellor by way of appeal. A cause heard *a second time* by the lord chancellor must be opened as a case. (a) The petition for a *rehearing* is signed by two counsel, and ought to state the grounds on which it is sought to rehear the cause; but if it states a case different from that before the court when the decree was pronounced, it will be ordered to be taken off the file; (b) nevertheless, on such rehearing additional evidence may be adduced. (c) If it be necessary to introduce new facts there must be a supplemental bill, in the nature of a bill of review, in which case the cause will come on to be heard upon the matter of that supplemental bill, together with a rehearing of the original cause; and the court will vary the decree upon the rehearing, taking into consideration the new or lately discovered facts. There is only one instance of the court's refusing to grant a rehearing; (d) but a rehearing being granted does not stay proceedings under the decree unless a special order be obtained for that purpose. (e) The court, however, under some circumstances will *suspend* the decree, or part of

(a) 2 Atk. 49.

(b) 1 Meriv. 35.

(c) Ambl. 90. 13 Ves. 456. 1 Atk. 390.

(d) Fox v. Mackreth, 2 Cox, 158.

(e) 14 Ves. 585. 17 Ves. 399. 18 Ves. 452. 3 Madd. Rep. 78  
Beames' Ord. Cha. 268.

it, till after the rehearing. The party applying for a rehearing must deposit ten pounds with the register, to be paid to the adverse party in case the decree is not varied in a material point, and he is likewise liable to such further costs as the court may direct.

151. A cause is generally set down for a day certain, to be reheard; and notice must be given two days previously to the opposite parties. (a) The petitioner must also leave copies of the decree and petition with the judge two days before the rehearing. (b) When the cause comes on to be reheard, with respect to the party who petitions, it is only open as to the parts complained of; but with respect to the other party, it is open as to the whole. (c) There may also be a rehearing with regard to exceptions, pleas and demurrers, as well as of the cause.

## SECTION II.

### *Of the Bill of Review.*

152. A rehearing will not be granted if once the decree has been enrolled, even if only one of several defendants has caused the enrollment, [d] and the party aggrieved can in no case obtain relief against the decree by an original bill for the same cause, for then the decrees of the court would be contradictory, which would breed the utmost confusion. [e] The only remedy, therefore, in such case, is by a bill to set aside the decree *for fraud*; [f] or a *bill of review*, which lies against those who were parties to the original bill, and against them only, [g] and must be either *for error in law, apparent on*

(a) 1 Ves. Jun. 45.

(b) Beames' Ord. Cha. 263.

(c) 1 P. Wms. 299.

[d] 1 Sch. & Lef. 234.

[e] 3 Ves. 386. 13 Ves. 564.

[f] 3 Atk. 811.

[g] 3 Chan. Rep. 94.

*the face of the decree, or on some new matter which came to the knowledge of the party AFTER PUBLICATION. [a]*

**153.** In the former instance the bill may be filed without leave of the court; but for a bill of review grounded on the discovery of new matter, a petition to the court, supported by a strong affidavit of the discovery, is necessary, together with a deposit of 50*l*. [b] A party cannot, upon a bill of answer, assign for error matter of form only, or of abatement; [c] for it is too late to take advantage of these defects when the decree is perfected and *substantial* justice administered; neither can he object that any of the matters decreed are *contrary to the proofs in the cause*, [d] for this relates to the facts rather than the law; and a fact misunderstood by the court, may be a ground for an appeal, but not for a bill of review. And the reason for this is, that the object of a bill of review is to give the court an opportunity of correcting a *manifest* error, into which it may have been inadvertently led, or *unavoidably*, from the want of the entire evidence in the cause, so as not to oblige the party aggrieved to resort to an appeal to parliament, and not to call upon the court to reconsider a deliberate opinion which has already received the last solemn sanction of the law by being recorded. The bringing this bill does not impede the execution of the former decree; and on the contrary, a person is not allowed to file a bill of review unless he has performed the decree to the utmost of his power; and if the decree be for the payment of money, he must pay it, or give security, although it should afterwards be ordered to be refunded. [e] A bill of review lies only for him *against* whom there has been a decree, [f] and none but parties or privies can have it, since nobody else can be aggrieved by such decree, because it can only be revived upon such privies; but if it be for error apparent on the face of the decree, a person not

[a] 2 Freem. 178. 3 P. Wms. 371. 3 Atk. 35.

[b] 2 Atk. 138. 2 P. Wms. 283. 16 Ves. 348.

[c] 3 Bro. P. C. 305. 1 Cha. Ca. 122. 1 Eq. Cas. Abr. 164.

[d] 1 Vern. 166. 2 Ball & Beatty, 154.

[e] 1 Chan. Ca. 42. 2 Freem. 172. 1 Vern. 117.

[f] 2 Freem. 182, 183. Chan. Ca. 51.

a party, but whose rights are injured by it, may file the bill. [a]

154. The usual defence to this bill when brought for error apparent, is by a plea of the decree and a demurrer as to the errors assigned; [b] which being set down to be argued, the court proceeds to affirm or reverse the decree, or if the bill be brought on new matter, fitting to be answered, the defendant must put in an answer, or plead thereto; and the prevailing party takes the deposit of fifty pounds. Twenty years after the pronouncing of the decree, is the limitation for a bill of review. [c]

[a] 4 Ves. 564.

[b] *Vide post*, Part II. cap. 4. sec. 3.

[c] 5 Bro. P. C. 400. 6 Bro. C. C. 395. 3 Bro. C. C. 539.

## CHAPTER XV.

## Of Execution.

**155.** The progress of a suit in chancery being thus traced through its several stages to its final completion in the decree, it remains now only to add a few words upon the manner of enforcing decrees, or the process of *Execution*.

The ancient and regular course of the court is, *after the decree is signed and enrolled*, to issue a *writ of execution* against the defendant. This writ recites the decree, and commands the performance of it; it must be served personally on the defendant, but service may be substituted on his clerk in court by motion, supported by an affidavit of sufficient grounds. [a] If, after service of the writ, the defendant refuses to perform the decree, the usual process issues, as in other cases of contempt. On the return of a *distringus* against a corporation, a sequestration issues immediately, without an *alias* and *pluries distringus*; and if the company have no goods, the members are liable individually. [b]

**156.** But it having been found extremely inconvenient to be obliged to run through the entire process, as for want of an appearance, and as the *writ of execution* cannot be sued out till after enrollment, by which the defendant had frequently an opportunity of absconding, it became the usual practice (and now almost universal) immediately on the *passing* and *entering* of the decree, to obtain a short order, that the defendant should comply with the terms of the decree within a given period, or that a sergeant-at-arms should go against him.

**157.** If the sergeant-at-arms returns "*non est inventus*," a sequestration issues; and the rents, issues and profits, together with the goods of the defendant, are applicable to the

[a] 12 Ves. 203.

[b] 2 Vern. 396.

liquidation of the complainant's demand, under the direction of the court, [a] in which respect it differs from the sequestration on mesne process. A sequestration will also issue on the return of an attachment, that the party is in the custody of warden of the fleet, because the imprisonment is for the contempt; the sequestration in satisfaction of the decree. [b] A person claiming under a title paramount, may be examined upon interrogatories before the master "*pro interesse suo*"; [c] or if the question to be tried is pure matter of title, the court will give him leave to bring an ejectment, with proper directions to protect the possession. If by the master's report it appears that goods were taken, the property of another, the court will order them to be specifically restored, and a reference will be made to ascertain his damages. [d] Exceptions cannot be taken to the report, because the suit is concluded by the decree; but if objectionable, the report should be set down on further directions. [e]

**158.** When the decree or order is for the performance of some specific act—as to deliver up deeds and papers, or to answer on interrogatories, or such like, and the defendant, being in custody, still persists in his contumacy, the complainant may have him brought into court by "*habeas corpus*," and admonished; and the court may set a fine upon him and award process to the sheriff of the county where his estate lies, to levy and pay it into the Hanaper; and may order him to be kept a close prisoner. [f] An escape warrant lies by Stat. 5 Anne, c. 9, in respect of persons who have been committed for non-performance of orders or decrees.

**159.** So far, the proceedings are "*in personam*," merely; but if the decree be "*in rem*," as for the delivering up of an estate, the complainant may obtain an order for an injunction, commanding the possession of the lands to be yielded up to

[a] 2 Atk. 23. 1 Dick. 106.

[b] 18 Ves. 314. 3 P. Wms. 240.

[c] 9 Ves. 335.

[d] 3 Ball. & Beatty, 57.

[e] 1 Dick. 94.

[f] 4 Bro. C. C. 30.



him, according to the decree pronounced in the cause; and the court will grant a commission to the sheriff to put the party in possession, together with a *writ of assis'ance*, if required, commanding the sheriff to aid and abet in so doing with the power of the county. [a] But if the complainant has not made all the persons deriving an interest in the lands parties to the suit (unless their interest was acquired pending the cause), he must proceed at law to recover the possession; for none but parties in the cause can be affected by the decrees.

[a] Harr. Chan. Prac. 333. 3 P. Wms. 379.

## CHAPTER XVI.

**Of Supplemental Proceedings and Secondary Bills.**

**160.** Before we conclude this review of the practice of the Court of Chancery, it will be necessary concisely to advert to the nature of the proceedings on *Supplemental Bills* and *Bills of Revivor*, which, being incidental and secondary only to the original suit, could not, with convenience, be treated of in the former part of the work.

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## SECTION I.

*Of Supplemental Bills.*

**161.** A supplemental bill, properly so called, is a bill filed for the purpose of supplying a defect which has arisen in the progress of the suit, by the happening of some event *subsequent* to the filing of the original bill. We have already seen that if the complainant discovers any *original* deficiency in his bill, he is at liberty, up to the time of joining issue, to cure the omission by amendment; and that for the purpose of merely adding formal parties, the amendment may be made at any period of the suit. If, however, such parties are rendered necessary by any circumstance having occurred after the bill filed, there must be a supplemental bill. [a]

**162.** After the pleadings on both sides are closed, the complainant cannot remedy an original deficiency in his bill by amendment, because that would be to open the whole anew, and would be productive of great irregularity and confusion. But if, at such a stage of the proceedings, he should discover any imperfection in his bill—as that he requires further discovery, or to put new matter in issue—he will be at liberty to resort to a supplemental bill for that purpose.

[a] *Mitt.* 49. 3 *Atk.* 217.

**153.** Thus, a supplemental bill is merely *in continuation* of the original suit, and filed for the purpose of filling up such a deficiency as does not cause a material alteration in the matter in litigation, or a change of the principal parties, and when, therefore, it is only requisite to *add* something to the *former* proceedings in order to attain complete justice; and this is the essential difference between supplemental bills and original bills, in the nature of them, the latter being, to all intents and purposes, the commencement of a new suit, which, nevertheless, may in its consequences draw to itself the advantage of the proceedings on the former bill. [a] A supplemental bill may be filed, even after a decree has been made in the cause; and it may be either in aid of the decree to carry it into execution, or to have further directions; [b] or it may seek to alter it, as on a rehearing, which is the peculiar case of a supplemental bill in the nature of a bill of review, already mentioned, or it may be added to a bill of review, where the circumstances require it.

**164.** In general, the supplemental bill must pray that *all* the defendants must appear and answer to the charges it contains; but if the defect in the suit is occasioned by an alteration, or acquisition of interest happening to a defendant, or a person necessary to be made a defendant, the supplemental bill may be exhibited against such person alone; and may pray a decree upon the particular supplemental matter alleged against that person only, unless the interests of the other defendants may be affected by that decree. [c] Where the supplemental bill is filed merely to bring formal parties before the court, the parties to the original bill need not be made parties to the supplemental bill. [d]

**165.** When the answers have been put in and the proceedings on the supplemental bill have arrived at the same point at which the original bill stood, they then proceed *pari passu*.

[a] Mitf. 78.

[b] 3 Atk. 133.

[c] Mitf. 59.

[d] Ibid.

together; and the cause must be heard upon the supplemental bill at the same time that it comes on to be heard upon the original bill. But if the supplemental bill is filed after the hearing or decree on the original bill, the cause must be again heard on the supplemental matter, and if it be in aid of the decree, directions are given that the new matter should be connected with the former decree. In general, on a bill to *carry a former decree into execution*, the court will only enforce, and not vary the former decree; [a] but where a bill is brought to *have the benefit of a former decree*, the court may examine the justice of the original decree; but then it must be upon the proofs taken in the cause wherein that decree was made, and the complainant cannot examine witnesses, much less the same witnesses to the matters in issue in the former cause. [b] Where a supplemental bill, after a decree, brings a *new person*, or a *new interest* before the court, it is open to the parties to make any objection to the decree that might have been made at the first hearing. [c]

**166.** When the supplemental bill is in the nature of a bill of review, which is, where new matter is discovered since the hearing which might induce the court to alter or reverse its former decision before the decree is signed and enrolled, a *petition of rehearing* is filed with it, and the cause brought on upon both together. This last kind of supplemental bill partakes so far of the nature of a bill of review, that it is necessary to obtain leave of the court to file such bill; and the same affidavit is required for this purpose as is necessary to obtain leave to file a bill of review on discovery of new matter, together with the usual deposit of fifty pounds. [d]

**167.** When a supplemental bill is filed *after publication*, for the purpose of putting new matter in issue, if there be no proof to the new matter the bill must be dismissed; but it would be irregular to examine witnesses to a matter *that was*

[a] Mitf. 75.

[b] 2 Vern. 409. 1 Ves. 245.

[c] 3 Bro. C. C. 392.

[d] *Vide ante*, p. 29. 2 Atk. 138.

in issue, and not proved in the original cause; and such proofs would not be suffered to be read at the hearing, [a] for the same reason that where parties are added by amendment *after publication*, the cause as to such parties must be heard on bill and answer only.

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## SECTION II.

### *Of Bills of Revivor, and in the Nature of Revivor and Supplement.*

**168.** If in the progress of a suit, any of the *principal* parties should die, [b] or a *feme* plaintiff marry [c] (whereby she can no longer sue,) or any other event should occur by means of which the original suit falls to the ground in consequence of there being no longer before the court any person by or against whom the suit can be continued, the court will in such case permit a bill to be filed by or against the person who comes in, *in the same right* as the original party, and *whose title cannot be controverted*, praying that the suit and the proceedings upon it may be restored to the same plight and condition as for or against the new party, in which it stood with respect to the original party through whom the abatement was caused. Such bill is termed a Bill of Revivor, and can only be had by or against the heir, executor, or administrator of a deceased party, or the husband of a *feme* plaintiff; for they alone come in by *a title that cannot be litigated*.

**169.** The reason why the court will allow the former proceedings to be revived in this case is, because as the new party comes in *in the same right* as the original party from whom he claims, he is clothed with all the rights and subject to all the duties to which the former was liable, and is bound by his acts; consequently the original suit remains, in all particulars, unaltered, except by the substitution of a party, who, being the

[a] Vin. Abr. tit. Chan. (R. A.) Ca. 8, 9.

[b] 2 Eq. Ca. Abr. n. 1, in marg.

[c] 1 Vern. 318. 1 Ves. 182.

representative of the original, *may* therefore claim the benefit of the former proceedings; or who, if a defendant, is bound by the acts of his predecessor, and cannot therefore make a new defence. It would be useless, therefore, to compel the parties to commence the whole suit "*de novo*," and retrace the same steps; but the complainant may either revive or file a new original bill, at his option. (a)

170. A bill of revivor strictly puts no question in issue between the parties, but is rather in the nature of a *petition* to have the suit revived; and it differs only from a petition in this: that it brings new parties before the court. But a bill of revivor may in some cases require an answer, as where the defendant is called upon to admit assets come to his hands; or he may be called upon to answer the original bill, when that had not been done by the original party. If, therefore, a person comes in who, though *standing in the same right* claims by a title that may be disputed, and, consequently, must be put in issue, there cannot be, in such case, a bill of revivor. Thus, for example, a devisee cannot bring a bill of revivor in right of his testator, but he may file an original bill, stating the former proceedings, *charging the validity of his title*, and praying thereupon to have the proceedings revived; and if his title, thus put in issue, be either admitted or proved, he is then entitled to all the benefits of a revivor. This, therefore, is termed *an original bill in the nature of a bill of revivor*.

171. Again, if the property which is the subject of litigation be entirely transferred from either of the original parties to a third person, who does not hold *in the same right*, as in the case of succession to a benefice, here the suit is at an end, as the party by or against whom it was carried on is out of court, for want of interest; and it cannot be continued for or against the new party in whom such interest is vested by bill of revivor, because *the title may be litigated*; nor yet by an *original bill in the nature of a bill of revivor*, because as the new party does not come in *in the same right* as the original

(a) 1 Vern. 463. 3 Atk. 486.

party he is not bound by his acts; nor is he entitled to the same claims, or subject to the same duties, except so far as he is placed in a *similar* position with his predecessor. In such case, therefore, there must be an entirely new suit commenced, which has relation to the original suit only to the extent that, in so much as it agrees with the former circumstances, the court will make similar orders; and in this respect it is termed *an original bill in the nature of a supplemental bill*.

**172.** In all these cases, however, the parties we allude to must be the *principal* parties; for when any event occurs which causes a change in *formal* parties, such as trustees, or in parties who have but a secondary or remote interest in the subject of litigation, and who must therefore be brought before the court in order to have a complete decree; this being only a defect arising in the original suit, may be supplied by a supplemental bill, merely. But if such *formal* parties happen to be *principal* parties likewise, as in the case of persons carrying on a suit *en auter droit*, such as assignees under a commission of bankrupt, then the death or removal of these parties will cause an abatement of the suit. The new bill, therefore, to bring their successors before the court, will be *supplemental* in respect of their being *formal* parties, and in the nature of a bill of revivor, in respect of their being *principal* parties, and is therefore termed *a supplemental bill, in the nature of a bill of revivor*.

**173.** A bill of revivor being a petition for the restoration of an abated suit, with *all* its proceedings, must not pray that *part* only of these proceedings shall be revived, but the whole will be restored to the condition it stood in when the abatement happened. [*a*] Proceedings in cross causes are not revived without a bill of revivor in each, except as to any matter of an account decreed, when both parties being equally interested, a bill in one cause praying the whole may be revived, revives the whole. [*b*] This, then, being the sole object of the bill, it must not contain more new matter than is neces-

[*a*] 2 Chan. Ca. 80. Gilb. For. Rom. 174.

[*b*] Hinde, 51. Gilb. For. Rom. 174.

nary to show a title to revive, and anything beyond that would be demurrable. [a] Much less must it contain any variation from the original bill. [b] But the omitting a complainant to the original bill, and stating the reasons of such omission (as that he had executed a release to his co-plaintiffs), [c] or the omission of a defendant who had not answered [d] the original bill, is not considered such a variation as to vitiate the revivor. Where the bill of assets requires an admission of assets from the representatives of the deceased party, or otherwise that an account may be taken of what has come to their hands, this is merely part of the case necessary to show the *title* to revive; and if the representatives do not admit assets, the cause must be heard on the bill of revivor, that the amount of the property of the deceased party answerable to the demands of the suit may be ascertained; and so far the bill is in the nature of an original bill.

174. If a complainant refuses to join his co-plaintiffs in a bill of revivor he must be made a defendant and the reason stated; [e] and this, *ex necessitate rei*, is not such new matter, or such a variance as is demurrable. In like manner, if the interest of the deceased is severed so that part is vested in his heir and part in his *personal* representative, a bill of revivor may be filed for either in part only, so far as his interest is concerned; or the suit may be revived as to part by one bill, and as to the other part by another. [f] So, also, in the case of a bill by creditors on behalf of themselves and *other creditors*, any creditor, though not a party to the original bill, is entitled to revive; [g] and these are not such variations as can be demurred to, for they do not in any way alter the nature of the matter in litigation between the parties. Should any new matter, however, arise in consequence of the abate-

[a] 2 Eq. Ca. Abr. in margin.

[b] Hinde, 48.

[c] 2 Chan. Ca. 80.

[d] 1 Vern. 308.

[e] 1 Eq. Ca. Abr. 2. 11 Ves. 308.

[f] Mitf. 63. 1 Eq. Ca. Abr. 2-4.

[g] *Ibid.*



ment, which ought to be put in issue, or any alteration ensue necessary to be stated, this may be done by a supplemental bill added to and made part of the bill of revivor, which is thence called a *bill of revivor and supplement*. So, likewise, amendments may be made after a revivor, when the proceedings are in such a state as to admit them; and the new party will be called upon to answer the amendments in like manner as he must put in an answer where the original party had died without answer, or after exceptions allowed. Where the original party has pleaded to the bill, and dies before the plea is argued, the representative must plead *de novo*, for the first cannot be argued then. [a]

**175.** If the party whose death has caused the abatement be a complainant, his representative must bring all the original parties before the court; if a defendant, then the suit is revived against his representative only, the suit not having abated with respect to the remaining parties. Of course it can only be the interest of a party *complainant* to revive the suit; but after a decree pronounced it may be for the benefit of a defendant, or those claiming under him, to have the decree revived, and he will be at liberty to do so, if the complainants neglect or refuse to revive it. [b] It is not competent, however, for either party to revive a suit merely for costs, for this is *actio personalis et moritur cum persona*. [c] But if the costs have been *taxed*, and the *report made* in the lifetime of the party, this makes it a judgment debt, and the representative may revive. [d] In an injunction cause. if the suit abates the defendant may move that it be revived within a stated time, or that the injunction be dissolved; but he cannot himself revive merely for the purpose of dissolving the injunction. [e] In an information with a relator, if the relator should die the court will suspend further proceedings until another relator be appointed. [f]

[a] Harr. 77.

[b] 10 Ves. 406. 12 Ves. 317. 1 Meriv. 174.

[c] Gilb. For. Rom. 81.

[d] 2 Ves. 462. 2 Meriv. 116.

[e] 12 Ves. 311.

[f] *Vide* note to 1 Swanst. 305.

**176.** In a bill of revivor merely, the defendant must appear in a town cause, in four days exclusive; and in a country cause, in eight days, exclusive of the service of *subpœna*; or in default, process of contempt may be issued. Where it is necessary to make a former defendant a party to the bill of revivor also, although he has appeared and answered the original bill, yet if he cannot be found to be served with a *subpœna* to the bill of revivor, the complainant must proceed under the statute 5, Geo. II., c. 25, to have the bill taken *pro confesso*; [a] and service of the *subpœna* to revive on the clerk in court in the original cause, will not be allowed. [b] The defendant has eight days allowed him after appearance, to show cause against the revivor, and to put in answer, if it be required. If no cause be shown, the suit may be revived on motion, as a matter of course, upon an allegation that the time allowed for the defendant to answer, by the course of the court, is expired, and that no cause is shown against the bill; [c] and this, whether the defendant answers or not; for though the defendant should insist by way of answer, that the complainant has no title to revive, the court will notwithstanding, on motion, order the proceedings to stand revived, and refer the question of the validity of the cause shown to the hearing; since the defendant has thought proper to submit to the suit by answering. But if, at the hearing, the complainant does not show he has a good title to revive, he will take nothing by his suit. [d] When, therefore, the defendant can show cause against the revivor, as that the new party is not the heir, etc., or that he has not the like interest or the like cause of complaint, as in the former suit; or that the defendant is not the person subject to the demand; the proper mode of making the objection is by plea or demurrer; on the argument of which the preliminary question will be disposed of. [e]

[a] 2 Bro. C. C. 127. 1 Dick. 63.

[b] 2 Dick. 545.

[c] 3 P. Wms. 343.

[d] Mitf. 61.

[e] 3 P. Wms. 343. Mitf. 234.

**177.** Where a suit in equity abates by the death of the complainant, his executor or administrator must revive within six years, otherwise the statute of limitations may be pleaded, except where there has been a *decree to account*, in which case a bill of revivor is considered in the nature of a *seire facias*, and not within the statute of limitations. [a] And, in general, a bill of revivor lies not upon a decree of long standing, viz. *thirty years*; but the party may exhibit an original bill, and set forth the decree as evidence. [b] Notwithstanding an abatement by death, the court sometimes, with the consent of all parties interested, [c] orders collateral things to be done, such as the delivery of deeds and writings, or money to be paid out of the bank, without a revivor; but this is only done where the court must deliver itself from the custody thereof, and proceed *ex-officio*. [d] Revivor upon revivor lies until the interest of the thing in question be determined. [e]

[a] 1 P. Wms. 742. °

[b] 2 Chan. Ca. 216.

[c] 2 Ves. 400.

[d] Eq. Ca. Abr. 2. 1 Ves. 185.

[e] Hard. 201.

# PART THE SECOND.

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## CHAPTER I.

### Of Pleading in General.

"And know, my son, that it is one of the most honorable, laudable, and profitable things in our law, to have the science of well pleading; and therefore I counsaile thee especially to imploy thy courage and care to learne this."—*Littleton*.

**178.** The science of pleading has been so long regarded by those who are ignorant of its true nature and objects as a system invented for the purpose of evasion and the perversion of justice, an opinion which is unfortunately countenanced by the frequent miscarriage of causes upon small and trivial niceties in pleading. [a] that it will be necessary for us to enter into the consideration of pleading in general, its use and design, in order to rescue it from undeserved obloquy, and to endeavor to remove from the mind of the pupil the unfavorable impression he is apt to conceive on his first entrance upon the study.

**179.** From the number of minute and intricate rules laid down in the treatises on this subject, collected from decisions in an infinite variety of cases, the compilers of which consider it quite sufficient to refer to the authorities without stating the reason upon which the rule is founded, the student finds himself involved in a net of inextricable difficulties and niceties, for which he in vain seeks for a solution. He is terrified in approaching a subject which at first seems necessary to be committed to memory in order to be mastered. He is in despair when he observes its complication and minute magnitude, and

[a] *Hale's Hist. Com. Law*, 212.

he too often throws it up in disgust, from supposing that substantial justice is, in many instances, intercepted by mere technical, and, to him, apparently unmeaning forms. Add to this, that from the abuses that from time to time have crept into the system, "special pleading" has been long a byword for sophistry and the splitting of straws. We cannot, therefore, be much surprised at the number of prejudices to be overcome, on commencing the study of this branch of the profession, that so few ever become acquainted with its real principles, and that so little has been done towards bringing back the science to that ancient simplicity and perfection to which it had attained in the reign of Edward the Third. [a]

180. It will be our business, then, to make an effort to justify the encomiums of Littleton upon it; and to prove, as Lord Mansfield says, that the "substantial rules of pleading are founded in strong sense and in the soundest and closest logic; and so appear, when well understood and explained;" but which (as he remarks in the same case) "by being misunderstood and misapplied, are often made use of as instruments of chicanery." [b] To this purpose we must commence, by endeavoring to arrive at a clear and precise notion of what it is a man does when he is said to bring an action, or institute a suit against another. When a person feels himself aggrieved, and cannot otherwise have redress, he applies to the law to interpose its authority, in order to restore to him a right that is withheld, or to give him reparation for an injury sustained. But the law will not interfere by its ministerial officers, upon the bare suggestion of injury; it requires that the wrong shall be proved, and the right substantiated, for otherwise it might be turned into an instrument of violence. For this purpose courts of judicature have been erected, where the claims of the parties may be contested and the judgment of the law ascertained, before its sanction is awarded. The courts of law have, on their part, laid down certain rules and formulæ of proceeding, which long experience has taught to be the best

[a] *Vide* Hale's Hist. Com. Law, Co. Litt. 304, b. (h).

[b] 1 Burr. 319.

adapted to the purpose of arriving at a speedy and just decision; a departure from which rules must occasion great inconvenience, and sometimes a manifest defect of justice. [a] Hence causes are frequently delayed by the raising of mere technical, and, to a common observer, frivolous objections. And though this is an evil much to be regretted, it is one that arises more from the ignorance of practicers than from any inherent blemish in the law. [b] This is an observation which applies with peculiar force to pleading, the propriety and utility of the rules in which are not always so discernible as in the other branches of practice.

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## SECTION I.

### *Analysis of the Pleadings at Common Law.*

181. Upon complaint being made to a court of justice, its first step is to summon the defendant to appear and answer the allegations made against him. As it would be contrary to justice to pronounce an opinion "*altera parte inaudita*," the defendant thereupon comes and contests the plaintiff's right, either by disputing its legality or denying the facts, or some particular fact, on the ground of which such right is claimed; or alleging, on his own behalf, such matter as would operate to avoid the plaintiff's demand, by showing that no cause of complaint existed; or if it once existed, was subsequently removed. These are such answers as go to the *merits* of the point in dispute. But independently of these, there are *preliminary* objections which may be taken, to excuse the defendant from entering into any contest about the matter—as, that the court applied to by plaintiff for relief, is not the one proper to take

[a] *Sunt jura, sunt formulas de omnibus rebus constituta, ne quibus aut in genere injuria, aut ratione actionis errare possit.*—Cic. Pro. Q. Rosc.

[b] 1 Bos. & Pul. 59; where it is observed by Eyre, Chief Justice, that "infinite mischief has been produced by the facility of the courts in overlooking errors in form; it encourages carelessness, and places ignorance too much upon a footing with knowledge, amongst those who practice the drawing of pleadings."

cognizance of the suit; or that the plaintiff is, for some reason foreign to the cause of action, not entitled to claim the assistance of a court of justice; or lastly, that there is some defect in the mode of proceeding, which would ultimately render the interference of the law abortive.

182. These disputations of the parties were originally delivered "*ore tenus*" in court, and were noted down by the officer, that the court might understand what was the real point of controversy. And if any objection arose upon the law of the case, it was at once decided on argument. If the dispute turned upon a question of fact, it was sent to be ascertained, according to its appropriate mode of trial. In process of time, however, as the business of the courts increased, the parties were sent out of court to settle among themselves the terms of the question upon which the judgment of the court was demanded, or the verdict of a jury required; and thenceforward the counsel on both sides drew up, in writing, the several allegations and answers of their respective clients, until, in the course of the altercation, they arrived at some disputed point of law, or some material fact, distinctly alleged on one side and denied by the other: for not until then did they require the assistance of the court or jury. These preliminary disputations of the parties are termed *Pleadings*; and the point to which they arrive, is called the *Issue*.

The foregoing view at once furnishes us with the true end and design of pleadings, which is nothing more than to disencumber the question at issue between the parties of all irrelevant and perplexing matter; that so the court and jury may be saved from embarrassment by having the points submitted to their consideration distinct and material, and that the parties themselves may be spared the trouble and expense of unnecessary litigation. This accords with what Sir Matthew Hale says of "the art or dexterity of pleading," which, as he expresses it, in its use, nature and design, was only to render the fact plain and intelligible, and to bring the matter to judgment with a convenient certainty. [a]

[a] Hist. Com. Law, 212.

**183.** The student will observe that the rules of pleading, how complicated or abstruse soever they may appear, are all built upon the foundation of this single principle, and all aim at the accomplishment of this one object. It may seem extraordinary to some, how so plain and definite an object could ever be lost sight of in stating the claims of the conflicting parties, or that a principle so obvious could give birth to a system of rules upon which volumes have been expended; but whoever will reflect upon the many arguments which arise in ordinary conversation, and how few of them are ever brought to any conclusion, solely in consequence of the disputants traveling out of the true point in debate, will cease to be surprised at the first; and when we come to consider that the most abstruse and extensive sciences are founded upon data, comparatively few and simple, and that pleading is, in fact, a very important branch of dialectics, or the art of right reasoning, we shall no longer be astonished at the complication and variety of its rules, which, in reality, are no more than a counterpart of the rules laid down in the system of logic. Of this we shall have occasion to speak more at large by and by. These rules, when properly understood, are all conducive to the same end, and are perfectly intelligible when referred to the principle above stated. It is only when they are regarded as so many independent propositions, and grounded upon mere authority (in which light our writers on pleading are too much accustomed to treat them), that they appear to the student as an arbitrary and unmeaning collection, calculated to involve and embarrass the real justice of every case.

**184.** We shall now proceed to show the application of these principles to the several pleadings on either side, taking each of them separately as they occur on the part of the plaintiff and defendant: and first, of the *statement of the injury* suffered by the plaintiff, and his *application for redress*. Here then are two points to be considered: first, the nature of the wrong sustained, and how it is to be set out; and, secondly, the plaintiff's right to make the application to *the particular court*, and the form of such application. Of each of these in their order:



185. First, as to the *statement of the injury*. "Wrongs convey to us an idea merely negative, as being nothing else but a privation of right." (a) In complaining of a wrong done to him, therefore, the plaintiff does nothing more than set out a *right* of which he has been deprived. This leads us to the consideration of rights, which are nothing more than legal or equitable relations. To prove a right, then, the *relation* in which it is founded must be distinctly shown. And here we must premise that in speaking of relations we allude more particularly to such as arise *ex contractu*, and are the foundation of actions of that nature, as being more analogous to cases in equity, and quite sufficient for the purposes of illustration. Relations, again, let in three separate considerations: first, the parties with their several disabilities and liabilities in law; secondly, the subject matter, or contract, with the circumstances under which it was made; and, lastly, the legal and equitable incidents or rights, the withholding of any of which is the cause of complaint. Who, then, that for a moment reflects upon the vast and diffusive field of controversy which this includes, can be surprised at the difficulty attendant upon the preliminary arrangement of the points in litigation, or the number of minute regulations that have from time to time been found necessary to be adopted in order "to render the fact plain and intelligible, and to bring the matter to judgment with a convenient certainty."

Hence we see that the *statement* of the injury is composed of these three points: the setting forth the relation between the parties; the right accruing by such relation, and that such right is withheld. This entirely agrees with the ancient view taken of a declaration at common law, which was said to consist of three parts—the demonstrative, the declarative, and the perclose or conclusion, *unde deterioratus est*. (b) Here the *demonstrative* part, which states the names of the parties, and the *nature* of the action corresponds with the setting forth of the right, because at common law certain actions were

(a) 3 Blacks. Com. 2.

(b) Heath's Max. 2.

given for certain injuries; the *declarative* part which explains the *cause* of action is equivalent to the showing the relation between the parties, and the *perclose* is the complaint of injury sustained. The first and principal point, therefore, with the plaintiff, is to show his right, and however complicated and diffuse the statement in a declaration at common law, or a bill in equity, may appear, it is nevertheless reducible to two propositions, declarative of such right. The *first* proposition states the rule of law, that a certain right flows from a certain relation; the *second*, that the parties stand in such relation.

1. The *first* is proved—1st, by act of parliament, on which turns the question of construction; 2d, by precedent, on which turns the meaning and extent of the rule gathered from the precedent; 3d, by analogy, where a still more general rule is to be collected, from a variety of analogous cases, or from the universal principles of equity itself.

2. The *second* proposition is founded on the facts of the case, as stated in the declaration at common law, and the bill in equity. But these statements may be untrue, or inadequate. Their truth which is a question of fact, is decided by the verdict of a jury, at common law; and in equity, by written depositions and the defendant's admissions upon oath. But, secondly, the facts, though proved to be true, may be inadequate to sustain the assumed relation. As if, for instance, a man, who claimed some duty arising from the relation of copartnership, were unable to prove a contract for the participation of loss as well as profit (for without such essential ingredient, it would not be a copartnership concern,) (a) he would thereby fail to establish the relation on which his claim was founded, and this is frequently the ground of non-suit at law, and of dismissing the bill in equity. This point of adequacy, is purely a question of law, and is proved by showing that the case made out has all the essential qualities of the assumed relation; or in other words, that the facts proved, bring the case within the application of the rule of law, laid down in the

(a) *Vide* Hesketh v. Blanchard, 4 East, 144.

first proposition. The conclusion here is as much demonstration as any theorem in pure quantities.

186. Next, as to the *application* for redress: although every man who has suffered wrong is *prima facie* entitled to redress in a court of justice, yet as the law has established for the convenience and dispatch of business, several distinct and independent judicatures, with exclusive jurisdiction, the plaintiff must take care to bring his action or commence his suit in such court as has authority to take cognizance of the wrong complained of; otherwise, besides the general inconvenience that would result from an opposite course, great injustice might be done to the defendant if he were obliged to contest the right in an incompetent court, for want of adequate means of defence.

Secondly, there are certain disabilities, some of which are only temporary, imposed by law, which restrict those who are subject to them from suing in a court of justice; and, on the other hand, there are certain privileges attached to individuals in particular capacities, which exempt them from liability.

Thirdly, as the courts have by a series of decisions, laid down a system of proceedings which experience has proved to be the best calculated to attain the ends of justice, the application for redress must follow the established forms, that the defendant may at once know what and how to answer. The complaint must likewise be so framed as that the whole question, and between all the parties, may be brought before the court; since, otherwise, the defendant would be harassed by uselessly contesting a suit, in which complete and ample justice could not be finally administered. And, lastly, we may add under this head that no man is permitted to sue another while a former suit for the same cause of action is pending, either in the same or any other court of competent authority. "*Nemo debet bis vexari pro eadem causa.*"

187. We now come to the pleadings on the part of the defendant, or the answer which he gives to the complaint made against him; and here an obvious distinction presents itself,

corresponding with the division we have made of the complaint into the *statement of the injury* and the *application for redress*. The defendant either directly answers the *statement of the injury* by denying it altogether, or by confessing and avoiding it; or, secondly, if there be any objections to the *application for redress*, founded upon the reasons specified in the preceding section, he states such a ground why he should not be further called to account, at least until the disability be removed or informality rectified. The former are called *pleas in bar*, and go to the merits of the cause. The latter are termed *pleas in abatement*, their sole effect being to set aside the complaint, and are sometimes distinguished by the appellation of *dilatory pleas*, because their operation, for the most part, is only temporary.

**188.** As, therefore, pleas in abatement being merely objections to entering into the "*litis contestatio*," must precede the "*litis contestatio*" itself, we shall commence our observations with them; and, in point of fact, a defendant, after putting in a plea in bar, cannot plead in abatement, for, by submitting to answer the substance of the complaint, he waives all preliminary exceptions which might have been taken to the mode of application. The several species of pleas in abatement are conformable to the subdivision we have noticed in the application for redress.

1. First, therefore, if the suit be instituted in a court which has not competent authority, the defendant may state that circumstance as a reason why he should not answer to the cause of complaint; and this kind of dilatory plea is called a *plea to the jurisdiction*.

2. Secondly, the defendant may allege in abatement of the suit, either, first, a legal disability on the part of the plaintiff, disentitling him from seeking the assistance of a court of justice, or some privilege of the defendant, which saves him from responsibility. Of these, some are only temporary, and are the proper subject of abatement; others, again, are permanent and take away all right of action *at any time*. These latter,

therefore, are of an amphibious character, and may be pleaded in bar as well as in abatement; for it is manifest that these latter may be considered as an answer to the very cause of action, by annulling the relation between the parties. This second species of pleas in abatement are termed *pleas to the persons*; and under this head may be classed such pleas as state that the plaintiff is a fictitious person or dead.

3. Thirdly, if there be any defect in the mode or form of proceeding adopted by the plaintiff, arising from mistake or want of certainty in his statement of the cause of action, in consequence of which the real merits of the question cannot conveniently be inquired into, or, when inquired into, cannot lead to any satisfactory result, the defendant may take advantage of it by pleading the same in abatement of the complaint. The plea of want of proper parties is a plea of this nature, as also the plea of the pendency of another action for the same cause. Pleas of this last kind are strictly *dilatory* pleas, and have this quality annexed: that where the deficiency is in a point which comes more properly within the knowledge of the defendant, he must give the plaintiff a better form, i. e., at the same time that he states the error he must show how it may be corrected, as, for example, when he pleads a misnomer he must give the real name, for justice must not be eluded by any frivolous evasion. These pleas are "*kat exochen*," called *pleas in abatement*, because they go particularly to quash the form of proceedings, and conclude "*ut casetur billa vel breve*." The same objections, if they appear on the face of the pleading, may also be taken by *special demurrer*, which is the denial of the sufficiency of the pleading, in the particular matter *specified*; for this is a mere point of law, and does not involve any dispute as to fact.

189. Next, as to pleas in bar, or answer to the merits of the complaint, the substance of every complaint being, as we have already seen, the subtraction of some *duty or right* (these being co-relative terms) derived from an existing *relation*, the only conclusive answer must be, either of the four following

*Modes of Defence.*

1. First, confessing the relation, to deny *the right*; and this is the general issue in law, and is called a demurrer; an issue being, as was before stated, formed of an affirmative and negative. (a)

2. Secondly, confessing that the right demanded would follow from the relation assumed, to deny generally the *existence of the relation*, which is the general issue in fact, or to deny some particular allegation, upon which the whole relation rests.

3. Thirdly, confessing the right and the relation, to deny the *subtraction*.

4. And fourthly, confessing the subtraction, to give *some valid reason to excuse* the non-performance of a duty. The two latter are called *special pleas in bar*.

190. Again: *the reason assigned in excuse* may be two-fold, in reference to the two propositions concerning the relation and the right. *First*, it may be *some new matter to invalidate the prima facie relation* set out in the complaint; or *secondly*, it may be *some new matter* by means of which, supposing the *relation* to exist, yet the *right* derived from it is gone; and here it is obvious that the reason alleged must be of new matter; for if the same statement appeared on the face of the complaint, the defendant might at once deny the right; which, as observed above, would be a demurrer, or general issue in law. It has been before remarked that relations may be considered with respect to the *parties*, the *subject matter*, and the *incidents*.

(a) It may appear startling, from its novelty, to class demurrers under the head of pleas in bar; but taking the definition of pleas in bar to be such answers as go to the gist of the action, demurrers are clearly a species, being the pleading which tends an issue *in law* as the general issue does *in fact*; and the general issue is confessedly a plea in bar. In reality, however, it matters little how the parts are distributed, provided the arrangement be intelligible; and that has been the principal aim of the present treatise.

1. First, then, to *invalidate the relation*, the new matter may show, *first*, that the *parties* were incapacitated from contracting the relation, or are incapable to continue it. *Secondly*, that the *subject matter* was insufficient or illegal, or had undergone some alteration. *Thirdly*, that the *right*, being incidental, had not accrued.

2. Second, the new matter may show that the *right*, though once existing, is barred by the act of the *party*; by the act of *law*; or, lastly, by the act of *God*, or unavoidable calamity.

The student, upon examination, will find that every possible species of defence is included under the above heads, and may be referred to some one of the foregoing classes—a proof of the correctness of the principles from which they are deduced.

191. Upon an attentive investigation of the *four modes* of rebutting the complaint just enumerated, it will be seen that the fourth is in a great measure resolvable into the second; for it is manifest that whatever matter is adduced to demonstrate that the relation is invalidated or its incidents altered, will tend to prove that it is not the same as stated in the complaint, and therefore may be *denied generally*; and this, at first view, would appear to be the shortest course. In effect, many things which might be pleaded specially in excuse, are allowed to be given in evidence under the general issue, in avoidance of the claim. (a) But there are three grand objects achieved by special pleas: first, the law and the fact are kept distinct; second, the issue is narrowed, by means of which the points to be proved in evidence are considerably diminished, and the parties saved expense; and third, the court and opposite party are apprised of the nature of the defence. (b) Wherever the attainment of these three ends, therefore, is not materially obstructed, the court has given great latitude in allowing the general issue to be pleaded.

192. From what has been said above, it is clear that to constitute a sufficient answer to any material allegation in a

(a) *Vide* 1 Chitty on Pleading, 468.

(b) 1 Lord Erskins's Speech, 275 to 278.

pleading, the adverse party must either deny the allegation altogether, or *confess* the fact, and *avoid* the inference, viz: by setting up some new matter *consistent* with such allegation, but which, if true, is an answer to it. (a) If, however, he set forth matter *inconsistent* with the allegation, by way of avoidance, this will not be sufficient, without a direct denial of the allegation. And this for two reasons: first, because as the *inconsistent* matter is in effect a different statement, both statements may relate to distinct subjects and so be both true; (b) and, second, such denial avoids prolixity, by tendering an issue at once, and gives the party an opportunity to prove his allegation.

**193.** A denial of this kind, prefaced by matter of avoidance, is called a *traverse*, and begins with the technical words "*absque hoc.*" The preceding statement is termed the *inducement*, (c) and such formal traverse is only necessary when it is requisite to show that the point traversed is material; (d) otherwise a simple denial, according to the second mode of defence, will be sufficient. (e) As the inducement, therefore, shows the materiality of the traverse if the inducement be bad, the traverse will be insufficient. The inducement, however, cannot be met by a denial, because it is enough for the opposite party to prove his allegation true (which the traverse enables him to do). and then the inducement being of inconsistent matter, if relating to the same subject, must be false; or relating to a different subject, does not operate as an avoidance. This is the meaning of the rule laid down in the books, that "a traverse cannot be taken after a traverse." (f)

**194.** The immediate use and design of pleading is the formation of an issue, which Lord Coke defines to be "a sin-

(a) 1 Saunders, 22. n. 2.

(b) *Vide* Bennet v. Filkins, 1 Saund. 23.

(c) Summary on Pleading, 75. 1 Saund. 22, n. 2. 1 Chitty, 592, n. (g) and 699.

(d) Com. Dig. Pleader, G. 20.

(e) 1 Saund. 103, b.

(f) 1 Chitty on Pleading, 612 Com. Dig. Pleader, G. 17.



gle, certain, and material point, issuing out of the allegations or pleas of the plaintiff and defendant, consisting regularly upon an affirmative and negative." (a) As soon as this object is effected, therefore, in such a manner as to answer the whole of the precedent pleading, the matter is brought to a close; and the party who first arrives at that point is said to tender an issue; and concludes by praying the judgment of the court, if it be a question of law; or if it be a matter of fact, he concludes to the country, i. e. he demands a trial by jury; for if it be a disputed record, he appeals to the record itself, and the adverse party joins issue by doing the like. On the other hand, when a pleading introduces new matter by way of avoidance or excuse, it only concludes with a verification, because such new matter may be contested as to its validity in law or its truth in fact, or the other side may adduce new reasons to invalidate it in turn. In this latter case, the pleadings must advance one step further.

**195.** Having taken this view, we shall now proceed to the plaintiff's reply to the defendant's plea, called the *Replication*. The replication being an answer to the plea, we shall consider it with reference to the *four modes* of defence already enumerated. It is manifest that the first two constitute issues, there being an affirmation on one side, met by a denial on the other. The replication in these cases, therefore, only joins issue.

**196.** The third mode of defence, namely, the denial of subtraction is always put affirmatively, by averring a performance; because this is a proposition which admits of dispute both in law and in fact, and therefore the opposite side should have an opportunity of answering it, which is done by assigning a particular breach. This last mentioned replication bears a strong analogy to that which is called a "*novel assignment*," (b) viz: where the complaint not having been set out with

(a) Co. Lit. 126. a (q.)

(b) 1 Chitty on Pleading, §17. 1 Saund. 299, n. 6. Com. Dig. Pleader, 3 M. 34.

sufficient precision, it becomes necessary, from the evasiveness of the plea, to re-assign the cause of action with fresh particulars.

**197.** It is, however, the excusing non-performance (being the fourth mode of defence) which opens the widest range for replication. The statement of excuse may, like the statement of the right, be reduced to two propositions, and of a similar nature. The first proposition is—

*That certain incidents superadded to the admitted relation, operate as a legal discharge to the otherwise resulting liability.*

The second—*That such incidents affect the acknowledged relation.*

Therefore, *That the defendant is discharged from liability.*

The *first* proposition here is a question at law, and may be met by demurrer; the *second* is a question of fact, and may be denied or confessed, and avoided by a new showing; or traversed, in a manner precisely similar to that which we have described at large, when treating of pleas in bar.

To the replication the defendant must again *rejoin*, by taking issue or tendering issue, or adding new matter of avoidance; and so on, until the parties arrive at the true and simple point of controversy.

**198.** This will suffice to convince the student that the rules of pleading are, in reality, founded in common sense, and are by no means so abstruse as he might be inclined to suppose them. At the same time, that they offered the greatest possible scope for exercising the intellectual faculties, and might, with great advantage, be studied for the mere improvement of the reasoning powers. Indeed, pleading affords the most beautiful illustration of the nature and utility of the art of logic—an art which has also been greatly and undeservedly decried, but from which the most important advantages may

be derived, both in morals and science. (a) It would perhaps be a very desirable improvement in the teaching of this art, if the examples to its rules were drawn from pleading; as this method would at once furnish both the practical application and the proof of its utility. Sir W. Jones, in the prefatory discourse to his translation of the speeches of Isæus, remarks, "that our science of special pleading is an excellent logic; it is admirably calculated for the purposes of analyzing a cause; of extracting, like the roots of an equation, the true points in dispute; and referring them, with all imaginable simplicity, to the court or the jury. It is reducible to the strictest rules of pure dialectic; and if it were scientifically taught in our public seminaries of learning, would fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding as effectually as the famed Peripatetic system; which, how ingenious and subtle soever, is not so honorable, so laudable, or so profitable, as the science in which Littleton exhorts his sons to employ their courage and care."

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## SECTION II.

### *The Analogy of the Rules of Pleading to Pure Dialectics.*

199. In order to show the close connection which exists between the forms of pleading and the rules of logic, we shall endeavor to put the foregoing pleadings into a dialectic form, which will also serve to elucidate the observations we have already made.

The declaration may be resolved into a syllogism, of which

(a) Lord Coke, in his Commentary on Sect. 381 of Littleton, says, "By this argument, logically drawn a *distinction*, it appeareth how necessary it is that our student should (as Littleton did) come from one of the universities to the study of the common law, where he may learn the liberal arts, and especially logic; for that teacheth a man, not only by just argument to conclude the matter in question, but to discern between truth and falsehood, etc., whereby it appeareth how necessary it is for our student." Co. Litt. 235, b.

the *major premiss* states the rule of law, and the *minor* shows the application of the case to the rule. This syllogism, however, is usually an enthymeme, of which the *major premiss* is suppressed. To take a familiar example, suppose debt on bond, the declaration states:

*Min. That the defendant acknowledges himself, by a certain writing obligatory, bound to pay a certain sum to the plaintiff.*

*Therefore, he ought to pay it.*

Here the *suppressed premiss*, which for greater convenience we shall make an hypothetical, is:

*Maj. If a man acknowledges himself, by a writing, obligatory bound to pay a certain sum, he ought to pay it.*

This is the general rule of law, and is *prima facie* true.

**200.** Now let us examine each proposition separately: if the minor be false, the defendant at once pleads the general issue of "*non est factam*," which is equivalent to "*negatur minor*" and puts the plaintiff on the proof. If the minor be true, then the error must lie in the suppressed premiss, or the conclusion is badly drawn. But the hypothetical major may be had in two ways: first, the consequent may not follow from the antecedent at all, or, in the words, there may be no such general rule of law; and to this the defendant may demur, which is equivalent to "*negatur major*;" but, secondly, as the antecedent of the hypothetical is indefinite, it may be taken either as universal or particular, i. e., it may be considered as an universal rule, or one admitting of exceptions if it be taken in the argument as universal, then it may be bad; or, in other words, there may be exceptions to the general rule of law. And, on the other hand, if in such case it be taken as particular, then the conclusion is improperly drawn, for it is "*argumentum a particulari ad universalem*," because, the conclusion being in the singular, the subalternans, from which it is deduced, must be universal. In other words, the defendant may show that the case falls within the exceptions,

and not within the rule; and this he must do by special plea, which is equivalent to a "*non sequitur*," and must be proved by a collateral argument, for it is not enough to show that there are exceptions to the general rule, but the defendant must prove his case to be one of the exceptions. And, in general, where the conclusion is contingent it will be taken to be good until the contrary is proved. Another reason why the defendant is, in this latter instance, bound to prove his case, is because no man shall be obliged to prove a negative, which the plaintiff would be compelled to do if it lay upon him to show that the case did *not* fall within the exceptions.

Let us suppose, then, in the example given, that the defendant pleads "*solvit ad diem*." We shall now examine his collateral syllogism.

Here the suppressed premiss is:

**Maj.** *If the condition of the bond has been performed, then the defendant is not liable.*

**Min.** *The condition has been performed, for the money was paid at the day.*

*Therefore, the defendant is not liable for the penalty.*

**201.** The student will observe that the minor of this syllogism is not a simple proposition, but that the whole argument is in fact a "*sorites*," though expressed for the sake of brevity in the above form. Here "*negatur major*" is a demurrer to the exception, or that there is no such exception to the general rule of law laid down by the plaintiff. But the minor is resolved into two parts, namely, whether the money has been paid in the manner stated, or at all; and, secondly, whether such payment is a performance of the condition. The first is put in issue by a *negatur minor*, and the defendant must prove it at the trial; the second point results from the major of the second syllogism, into which the *sorites* is resolved, and is a demurrer in law by a "*negatur major secunda*."

**202.** We might pursue this investigation much higher, but we have purposely selected the simplest example for illustration; and this, it is apprehended, is sufficient to let the student see that the principles of special pleading and those of pure dialectics are perfectly similar. (a) It is obvious that the illustrations we have adduced refer only to special pleas in bar. The same logical method is, however, equally applicable to all other pleas. In effect, the declaration does not confine itself to the naked proof of right, but proceeds to show, by a statement of demand and refusal, that the right is withheld, and therefore the plaintiff calls upon the court for its assistance, or, in other words, the sanction of the law. By this concluding part of the declaration, the competency of the jurisdiction, the non-disability of the plaintiff, and the correctness of the form of proceeding, are all inferred; and if the defendant can show a deficiency in any of these particulars he may plead the same in abatement. And these propositions, like the former, may be all put in the syllogistic form, and their correctness tried by the same test.

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### SECTION III.

#### *Of Pleading in Equity, and its Analogy to Common Law.*

**203.** We shall now proceed to show the application of the principles we have laid down, to cases in equity, and although from the difference in the forms of proceeding in chancery it may not appear at first sight, yet upon a closer inspection we shall find that there is a strict analogy between the pleadings in equity and those at common law.

**204.** The original writ, sued out at common law, requires the defendant to repair the injury complained of, or to appear

(a) "The structure of a record raised on these foundations is not less solid than the demonstration of a proposition in Euclid; and pleading, formed on these maxims, is not only matter of science, but perhaps affords some of the best specimens of strict genuine logic." *Vide Wynne's Eunomus, Dial. 2d.*

in court and show cause to the contrary. The declaration afterwards is but an exposition or amplification of the writ. If the defendant contests the suit, he comes in and pleads, in the manner we have described in the former part of this chapter. Proceedings in *equity* are commenced by a petition to the court, to issue the king's writ of *subpœna*, to compel the defendant to appear and "answer concerning those things which shall be objected to him; and farther, to do and receive what the said court shall have considered in that behalf;" which is the language of the writ. The petition must, therefore, state the cause of complaint, as a ground for issuing the *subpœna*. Originally, when the defendant appeared on the *subpœna*, articles in writing were exhibited to him, containing such charges as he was required to answer upon oath; but it was found more convenient to insert such charges in the body of the petition itself, which was thence denominated a *bill* in chancery. Hence the primary object of a bill is to obtain a discovery upon oath from the defendant, and then to have such relief grounded upon the defendant's admissions, or the complainant's proofs, as the court shall think proper. The bill, therefore, being framed with a view to extract a discovery in the first instance, is generally of considerable amplitude, stating a variety of circumstances by way of inducement, and usually anticipating and controverting the defence of the adverse party. In this respect it differs from the declaration at common law, which is a pure pleading, confined to the single and simple point of charge or statement of injury; and from this difference, it will be seen, some of the apparent anomalies in pleading in equity arise.

**205.** As the bill in setting out a cause of complaint must state an injury sustained, or likely to be sustained, it will contain the two propositions to prove the right formerly noticed, (a) and will, in substance, admit of the same modes of defence as at common law; whatever dissimilarity exists, is caused by the difference of form. The prayer of the bill is, in the first instance, that the defendant shall be compelled to

(a). *Vide ante*, p. 157.

answer upon oath the several allegations contained in the bill; and thus it performs the office of an *examination* as well as of *complaint*. Hence arises a species of pleading in equity different from anything we have hitherto seen, namely, the *answer* to the bill; which in analogy to the bill, has the double character of a pleading and a proof, being a *plea* so far as it denies the allegations of the bill, perfectly analogous to the *general issue* at law; and a *proof*, so far as it contains admissions of any part of the complainant's case. Here, too, many facts which might have been available as a plea are allowed to be stated by way of answer, similar to the rule which permits such facts to be given in evidence under the general issue at common law. And the reason seems to be, that as the chief end of a plea in equity is to decide a preliminary valid objection, without putting the parties to the expense and trouble of arriving at the same point, by the circuitous mode of following up the suit, wherever that object will not be effected by a plea, the party is at liberty to resort to which ever mode of defence he thinks most suitable, for as the reason of the rule ceases, "*cessat et ipsa lex.*" The invariable rule of the law, that every defence which cannot be specially pleaded, may be given in evidence under the general issue; and a similar rule holds in equity; for wherever the party has a defence, which is not the proper subject of a plea, such defence may be stated in the answer. (a) Thus we find the answer either, 1st, traverses and denies the allegations of the bill; or, 2d, it admits them to be true; or, 3d, it confesses and avails such points as need not be specially pleaded to, and these are, in fact, the several parts of an answer, as laid down in the books of practice.

**206.** Now, as a decree of the court of equity is pronounced on a view, both of the fact and the law of the case, the answer, such as we have described it, might be deemed in all cases a sufficient defence, since it includes the *three last modes*; (b) and the question of law is determined at the hearing. But

(a) Mitf. 219. 1 Atk. 54. 2 P. Wms. 145.

(b) *Vide ante*, p. 162.



we must recollect that one of the principal objects of special pleading is to save the parties the expense and trouble of proving, by evidence, facts which might eventually turn out to be immaterial, or inadequate to sustain the right demanded.

**207.** From the nature of equity, it is obvious that the *right demanded* cannot be any definite essential quality, flowing from the relation, but only growing out of it incidentally; and which therefore must be determined "*secundum æquum et bonum*." This is the proper business of the court at the hearing; and when the rights of all the parties are ascertained, thereupon is grounded such measure of relief as the reason and justice of the case may require. The party complainant, therefore, after stating the hardship under which he labors, from the nature of the relation existing between him and the defendant, prays the court to grant him such specific relief as he conceives himself entitled to demand. The relief prayed includes, of course, the restoration of the equitable right, supposed to be withheld; and ancillary to relief, is discovery from the defendant; or the discovery may be the principal point, and the only right demanded. Hence the propositions of a bill may be universally laid down to be—1st: *That from the relation stated accrues the right to discovery, and such relief as is prayed for.* 2d: *That the relation stated is that which actually exists.*

**208.** It is evident that this first proposition assumes the sufficiency of the form of the application, as well as the existence of the right; from which it has been doubted whether equity has any pleas in *abatement*, as contradistinguished from pleas in *bar*; but this is a mere question of words, and not worth the inquiry. (a)

These two propositions admit of any defence which either, 1st, denies the *right* either to discovery or relief, or both; or, 2d, denies the *relation*; or, 3d, *invalidates* the relation, or *bars*

(a) *Merewether v. Melish*, 13 Ves. 437. And *vide* Beames, Pleas, 57, 58, 59. The difference between pleas in abatement and those in bar in equity, rests on precisely the same grounds as at common law.

the right. Most of these may be done by way of answer; but as it may be a principal object with the defendant not to answer at all, and as it will preclude unnecessary litigation to state a valid bar *in limine*, the first mode of defence must, in general, be taken advantage of by demurrer; the third, by plea. To these there is only a formal replication, for the purpose of tendering and joining issue; the necessity for special replications being obviated by the permission which the parties have to add to, and amend their pleadings.

**209.** From the principles above stated, it is sufficiently clear that the two modes of defence just mentioned are similar to the analogous ones at common law, and are here perfectly applicable; for in general terms, a *demurrer* is confined to the single point of law, but a *plea* opens the two questions of law and of fact, to either of which the opposite party may except. The demurrer, in the first mode of defence in equity, is taken on the complainant's own statement, by his bill; and consequently the facts cannot be disputed. In the third mode, the defendant puts forward a new statement of his own, and this must be by plea, that the complainant may have an opportunity to reply, and so put him to the proof of the new facts.

**210.** Hence is the grand distinction which is drawn between demurrers and pleas in the looks, that the one is an objection, apparent from matter contained in the bill; the other, from matter "*dehors*:" the bill. (a) But this latter is rather an accident than the essential difference, as the matter of a plea need not necessarily be *dehors* the bill. Accordingly we find that that species of plea, called a "*negative plea*," (b) does not advance any new fact which the bill had omitted, but is simply confined to the denial of a point stated in the bill, on which the whole right of action depends. Nor is this peculiar to equity; the plea of "*ne unques executor*" (c) "*ne*

(a) Beames on Pleas, 2 Mitf. *Passim*.

(b) Mitf. 187, 188.

(c) The plea of "*ne unques executor*," is classed by Lord Redesdale, among pleas in abatement; and is treated as such by Mr. Beames, when speaking of *negative pleas*. But it is manifestly a plea in bar, of the *second mode*; namely, the denial of a particular fact on which the relation rests. See also 1 Saund. 274, a. (n. 3.)

*unques accouple*," and such like, which are pleas in bar at common law, coming under the *second mode* of defence; and many of the pleas in abatement are strictly of the same nature as the negative plea in equity, and do not advance foreign matter. In like manner that species of plea which sets up a defence anticipated by the bill, and therein sought to be controverted, does not bring forward matter *dehors* the bill; and yet the objection cannot be taken advantage of by demurrer, but is, with strict propriety, the subject of a plea, *because it involves a question of fact as well as of law*. Such is the plea of release to a bill, which seeks to set such release aside on the ground of fraud, or want of consideration; or the plea to a bill to set aside a decree on the ground of fraud, and the like. Here the whole question turns on the validity of the bar sought to be impeached; and therefore the plea must go on to deny, by averment, the ground of impeachment; which is, in such case, the real point at issue. But this point is a point of fact, and consequently cannot be controverted by demurrer, which is an issue in law only.

211. But it is necessary that the fraud, or other matter, be denied by *answer* likewise. To seek for the reason of this peculiarity from the analogy of law, we must go somewhat deeper into the inquiry. In the first place, we must recollect that an issue is produced by a direct averment on the one side and a traverse on the other, and that party which first traverses or denies a specific averment, is said to *tender* an issue on that point. Now, at law no issue is tendered by the special plea, but as it always relies upon new facts, it concludes with a verification. And even in the case of a *special* negative plea there is no issue tendered by such plea, because it is not the denial of a distinct averment in the declaration, but only of a point assumed, and which must be formally averred before the traverse can tender an issue; and the negative plea, as it alleges no new fact, does not even require the usual verification. (a) In equity, since the disuse of special replications and rejoinders, there are but two of the pleadings which

• • (a) Co. Litt. 303, a.

tender an issue—the answer, on the part of the defendant, and the replication, on that of the complainant. When the defendant desires to take *issue in law* he files a demurrer, and the complainant sets it down to be argued, which is a joinder in demurrer; on the other hand, he tenders an issue on the facts by his answer, so far as it traverses or denies them; and the complainant joins issue by the first part of his general replication, which states that “he will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto;” and in the latter part, which maintains that “the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant,” he tenders an issue on his part to such portions of the answer as confess and avoid the bill, or to the new facts of the plea; and to this the defendant *pro forma* rejoins. As, therefore, in conformity to the rule of law, the plea in equity does not tender an issue, (a) in the case of negative averments being contained in the plea, the same points must also be denied by way of answer, for otherwise no issue could be joined on such negative averments. The complainant could not tender an issue upon them by his replication, for that would be but the negation of a negation, which, in fact, only amounts to an affirmative; and we have seen that an issue “consists upon an affirmative and an negative,” therefore the defendant must produce the issue in the only way which remains to him—that is, by answer. This difficulty is obviated at common law by a special replication, which may tender an issue affirmatively to the negative averment.

212. And here we must mark the distinction between a *negative plea*, which is frequently supported by affirmative averments, and *negative averments*, which are used in support of an affirmative plea. And this distinction will furnish us with another reason for the general rule laid down, viz: “that if there is any charge in the bill which is an equitable circumstance in favor of the plaintiff’s case against the matter pleaded, as fraud, or notice of title, that charge must be de-

(a) 2 Bro. C. C. 144.

nied by way of answer as well as by averment in the plea." (a) It will be seen at once that such denials are negative averments in support of an affirmative plea. Now we have before noticed that when the complainant intends to dispute the facts of the plea he replies, and thereby puts the defendant to the proof of his allegations, so that in this instance the defendant would be forced to prove a negative, which is contrary to reason and the rule of law. This absurdity is obviated by the defendant's denying the fraud or notice in his answer, which at once tenders the issue and puts the complainant on the proof. But besides the denial by way of answer, there must likewise be positive averments in the plea; and this for two reasons: first, because as the plea admits the facts of the bill, without such averment, it would acknowledge the fraud or other ground of impeachment to the bar; and, secondly, by such acknowledgment the plea would be imperfect, as a fraudulent release, for instance, would be no release, and therefore not a good bar.

213. This mode of pleading has been objected to on the ground of duplicity—a mistake which has arisen from want of sufficient attention to the distinction between averments in support of a plea and the pleading a double bar, which alone constitutes duplicity. (b)

Thus, it is humbly conceived, we have shown that this kind of plea differs not in principle from other pleas—a disquisition into which we have been led both because it serves to elucidate the nature of pleas in general and to point out the correctness of Lord Eldon's observation, "that the best rule is analogy to law;" (c) but, principally, because Mr. Beames in his learned Treatise on Pleas styles this an "*incongruous plea*," and thinks that it is not properly a plea, but something in the nature of one. His opinion upon this subject seems to have been formed from supposing that the essential difference between a demurrer and a plea is that the latter always relies

(a) Mitf. 241. *Roche v. Morgell*, 2 Sch. & Lef. 728.

(b) 1 Burrowes, 320.

(c) 9 Ves. 54.

on matter "*dehors*" the bill; whereas, the true distinction is that the demurrer is *an issue in law, on the complainant's own showing*; the plea is an objection raised by a *new showing* of the defendant. But the defendant's new showing may be of *old matter* stated in the bill (out of which matter a contradictory case may be made by traverse), although most usually it is altogether of *new matter*. And the reason for such new showing, whether old or new matter, being the proper subject of a plea, is that it lets in the *fact* as well as the *law*.

**214.** With the view that is here taken of this subject, the old definition of a plea in equity, laid down in the *Cursus Cancelariæ*, (a) and adopted by Lord Redesdale, strictly accords; and tends to fortify and prove the correctness of the foregoing reason. A plea is there defined to be, "a special answer to a bill, or some part thereof, showing and relying upon one or more things as a cause why the suit should be either dismissed, delayed or barred." (b) And, first, it is an answer because it avers and maintains one or more *facts* wherein it differs from a demurrer, which rests upon *law* only; and in some instances it denies allegations in the bill by negative averments.

But, secondly, it is a *special* answer, "differing in this from an answer in the common form, as it demands the judgment of the court in the first instance, whether the matter urged by it does not debar the complainant from his title to that answer which the bill requires." (c)

Thirdly: "It relies upon one or more things (not *new* things), as a cause why the suit should be either dismissed, delayed or barred." The first part of this member of the definition points out the integral division of a plea into the matter of it and the averments: "on one or more things" (*i. e.* facts or averments which may be manifold)—"as a cause"

(a) *Curs. Ca.* 180.

(b) *Mitf.* 178.

(c) *Roche v. Morgell*, Sch. & Lef. 721.

(i. e. the matter or bar) which must be single. (a) The latter part briefly gives the division of a plea into its several kinds.

**215.** This will give the student some idea of the extreme accuracy of most old legal definitions, which cannot be too attentively studied, and it was the more advantageous to pursue this subject so far, because he might be induced to conclude, from the loose manner in which it has been ordinarily treated, that the system of pleading in equity was not founded on any fixed principles, but left to fluctuate amid variable decisions and arbitrary rules.

(a) 1 Burr. 320. Mitford, 233, and the cases there cited.

## CHAPTER II.

## Of the Original Bill in Equity.

## SECTION I.

*Of the general Form and Structure of ordinary Bills.*

**216.** A bill in equity, as we have remarked in the preceding chapter, has a two-fold object in view, first, the statement of complaint, similar to the declaration at common law; and secondly, the examination of the defendant upon oath. So far as it is a mere pleading, the bill must set out the nature of the relation between the parties, and the particular incidents which create the hardship which is the cause of complaint; and one of these incidents is the want of adequate relief at common law. This is the main body of the bill. Again, so far as the bill acts the part of an *examination*, it must state all such matters of inducement, and such collateral circumstances as may tend to extract a discovery, or which may raise a presumption of the truth of the principal statement, even if denied by the defendant. Should there be matter of avoidance, of which the defendant might avail himself, the bill, as an *examination*, should also contain charges to rebut the defence. It has already been observed that the bill is a petition to the court for a *subpœna*, or such other writ as the exigency of the case may require; and, accordingly, it concludes with a prayer in the usual form of petition, and stating the ends for which this writ is prayed; which are, first, that the defendant may answer the several distinct allegations of the bill, which are for that purpose put in an interrogative form; and, second, that the court may interpose with relief.

**217.** This is the sum and substance of every bill which can be filed; and how long and intricate soever it may be drawn, it nevertheless contains but the four following parts:



1st. The circumstantial *statement of the relation*, including the inducement or introductory part.

2d. The incidents which produce the grievance complained of, including the *requests* made to the defendant, and his *refusal*.

3d. The statement of such collateral circumstances, if necessary, by way of *charge*, as may compel the defendant to acknowledge the grievance, or which may anticipate and controvert his defence.

4th. And lastly, by *reason* of the foregoing complaint, and for the want of adequate remedy at common law, it concludes with a petition for the *subpœna*, to the end that the defendant may answer the premises, and the court decree relief.

218. These four parts are each marked by certain technical language, with which they commence. The *first* part begins thus: "Humbly complaining, sheweth unto your Lordship, your orator, A. B. of —, that, etc.," and then proceeds at once to the statement. Here we must stop to observe that this commencement of the bill is framed to express its office, both as a *petition* and *complaint*. The words are: "humbly *complaining*, sheweth;" and it styles the complainant not your petitioner, but your *orator*, to mark the distinction between a bill and a mere petition, and to designate the higher character which he sustains. The word "orator" is used in allusion to the formal conclusion of all petitions, "and your petitioner will ever *pray*," (a) a custom which took its origin from the piety of our ancestors, and the authority of ecclesiastics in those primitive days, when the seals were always entrusted to churchmen, who were likewise the keepers of the king's conscience. (b) Another point to be observed in the formal commencement of the bill is, the grammatical inversion; a more remarkable instance of which, however, occurs in the last part of the bill, which we shall notice presently.

(a) In Ireland, the form used is, "your suppliant and *daily* orator," &c. "who remembers you daily in his prayers."

(b) 3 Black. Com. 48-54. Madox Hist. Exch. 42.

**219.** The *second* part commences, "And your orator hath frequently and in a friendly manner applied to and requested" [the defendant to do such acts according to the nature of the bill, as equity and good conscience required of him.] "And your orator well hoped that such his just and reasonable requests would have been complied with, as in justice and equity they ought to have been; but now so it is, &c." [i. e. the defendant, *confederating with others* to oppress and defraud the complainant, refuses to do what is just.] As this part is nearly the same in all bills; it has become a common form. If the circumstances creating the hardship be only such as the court can rectify or control, and not depending on the acts of the defendant, as where trustees desire to act under the direction of the court, and the like, then the above common forms are omitted, and the difficulty labored under is here stated according to the nature of the case.

**220.** The *third* part is generally introduced by a statement that the defendant makes various pretences to justify his refusal, the contrary of which the complainant *charges* to be true; and then proceeds to make such other charges as either corroborate his own statement or controvert the defence likely to be adopted by the adversary. "And to countenance such, his unjust conduct, the said defendant sometimes pretends that" [there is some good matter of excuse to discharge him from liability] "whereas your orator charges the contrary to be true, and that" [there are such other circumstances in the case as invalidate the excuse, or corroborate the statement]; "and other times he pretends" [other pretences], "whereas your orator charges the contrary to be true, and" [other charges.] And the whole concludes with the averment, "all which actings, pretences and refusals of the said *confederates*" [alluding to the charge of confederacy on the second part] "are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises."

**221.** The *fourth* part is, the petition to the court for the *subpœna*; and begins by formally setting out the *reasons* for applying to the court, viz: "In consideration whereof" (i. e.

"the wrong and injury" complained of,) and forasmuch as your orator is without remedy at common law, and cannot have adequate relief but in a court of equity; May it please your Lordship to grant his Majesty's most gracious writ of *subpœna*, etc., commanding the defendant to appear; *to the end* that he may distinctly answer upon oath whether each particular fact and charge in the bill is not as therein stated, or how otherwise; and that he may be decreed by the court to perform such acts as the court in its wisdom shall think proper, and the justice of the case may require. "And your orator shall ever pray," etc. The whole of the part, beginning with the words, "in consideration whereof," to the conclusion of the bill, is but a single sentence. There is, however, a considerable inversion in its form, the clause commencing "to the end," being put before the prayer for the *subpœna* "may it please," etc. The want of sufficient attention to this point, coupled with the circumstance of the extreme length of the sentence, the whole statement and charge of the bill being here repeated in the form of interrogation, and the prayer for particular relief being also included, has occasioned great perplexity in the mind of many a pupil, and in not a few instances, has prevented him from ever arriving at the knowledge of the true bearing and connection of the several members of this complicated sentence. Nor is the pupil much assisted in this difficulty by the usual division of a bill into *nine* parts, than which nothing can be more illogical and incorrect. According to this arrangement, to be met with in all the books, the several parts of a bill are: first, the direction or address; second, the parties; third, the plaintiff's case; fourth, the charge of confederacy; fifth, the pretence and charge; sixth, that part which gives jurisdiction to the court; seventh, the interrogating part; eighth, the prayer; ninth, the usual prayer for a *subpœna* or other process. The four last are included in the single sentence to which we have just called the student's attention, and which are thus presented to his mind as so many distinct and unconnected parts; and his embarrassment is increased by finding that in the precedents to be found in the books these several parts are marked as distinct periods.

In order to illustrate the foregoing observations, we shall insert here the skeleton of a bill :

To the Rt. Honorable the Earl of Eldon,

Lord High Chancellor of Great Britain :

(I.) Humbly complaining, sheweth unto your Lordship, your orator, A B, of      , gent. that [at a particular time mentioned, certain events took place which led to the relation now existing between your orator and C D, the defendant, hereinafter named.] And your orator further sheweth unto your Lordship that [your orator and the said defendant are parties to such relation, under circumstances to which particular equitable incidents are concomitant; whence arise certain duties to be performed by the said defendant, C D.] (II) And your orator hath accordingly, both by himself and his agents, applied to and requested the said C D to [perform the said duties;] and your orator well hoped that such, his just and reasonable requests, would have been complied with, as in justice and equity they ought to have been; but now so it is, may it please your Lordship, the said C D, combining and confederating with divers persons at present unknown to your orator (but whose names, when discovered, your orator prays he may be at liberty to insert in this, his bill, with apt and proper words to charge them as parties defendants hereto), and contriving how to injure and oppress your orator in the premises, absolutely refuses to comply with your orator's aforesaid reasonable requests. (III.) And to countenance such, his unjust conduct, he sometimes pretends [some matter of excuse to discharge him from liability;] whereas, your orator charges the contrary to be true, and that [there are other circumstances which invalidate the excuse of the said defendant and corroborate your orator's statement.] All which actings, pretences and refusals of the said confederates are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises. (IV.) In consideration whereof, and for as much as your orator is without remedy in the premises at common law, and cannot have adequate relief except in a court of equity, where

matters of this sort are properly cognizable and relievable, to the end that the said C D and his confederates, when discovered, may, upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, perfect and distinct answers make to all and singular the matters aforesaid; and that as fully and particularly as if the same were here repeated, and they thereunto severally and respectively distinctly interrogated; and more especially that the said C D may, in manner aforesaid, answer and set forth whether [at the time hereinbefore in that behalf mentioned, or at some, and what other time, certain events did not take place, which led to the relation now existing between your orator and the said defendant, or how otherwise; and whether such relation does not in fact exist; and whether your orator and the said defendant are not parties to such relation, under circumstances to which particular equitable, or some and what incidents are concomitant, or how otherwise; and whether such duties as are hereinbefore set forth to be performed by the said defendant did not arise therefrom, or how otherwise]; and whether your orator hath not, by himself or his agents, or how otherwise, made such applications and requests as are hereinbefore in that behalf mentioned, or some such or the like; or any and what other applications and requests, in respect of the several matters aforesaid; and whether the said defendant hath not refused to comply therewith, and why; and whether [such circumstances as are hereinbefore charged, for the purpose of invalidating the excuse of the said defendant, and corroborating your orator's statement, are not true, or how otherwise]; and that the said defendant may be compelled, by and under the decree and direction of this honorable court, [to perform such duties as are incident to the relation hereinbefore stated to exist between him and your orator:] and that your orator may have such farther and other relief in the premises as to your Lordship shall seem meet, and the nature and justice of the case may require. May it please, etc.

[Counsel's name,]

Pray Spa.

v.

C. D.

The above is the general form of every kind of bill, as prepared in the draftman's office; and with this outline before him the pupil will be able to shape his course without any difficulty, in all cases, and to judge what parts are essential and what may be omitted, according to the nature of the subject. We shall presently advert to this point more at large.

**222.** The pupil will observe that in the precedent of the draft, the conclusion being a common and invariable form of prayer for the *subpœna*, is marked by an "*&c.*," with a marginal direction to the solicitor, who is to have it engrossed at full length, as to the names of the parties against whom he is to pray process; for none are defendants to the suit, although mentioned in the body of the bill, unless process of *subpœna* be issued against them. (a) The conclusion of the bill, as engrossed, is as follows: "May it please your Lordship to grant unto your orator his Majesty's most gracious writ of *subpœna*, to be directed to the said C D, and to the confederates when discovered, thereby commanding them, and every of them, at a certain day, and *under a pain* to be therein limited, personally to be and appear before your Lordship, in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises; and *farther to stand to, perform, and abide such further order, direction and decree therein as to your Lordship shall seem meet*; (b) and your orator shall ever pray," etc. If the bill seeks for an *injunction*, or a "*ne exeat regno*," such writ is also prayed for in the conclusion, in addition to the writ of *subpœna*, for the form of which the student may consult the books of precedents, the above being sufficient for our purpose. In a *certiorari* bill, the only object being to remove

(a) 2 Dick. 707.

(b) If the bill be for discovery merely, the words in italics are omitted. Vide 3 Atk. 439.

the proceedings from the court below, the prayer for a *subpœna* is unnecessary, as the parties must follow in the suit. (a)

**223.** Where the attorney general is a defendant, instead of a *subpœna* the bill prays, "that his Majesty's said Attorney General, being attended with a copy of this bill, may appear and put in his answer thereto, and may stand to and abide," etc.; (b) and in the case of a peer, a letter missive is prayed, "to be directed to the said [peer], desiring him to appear to and answer your orator's said bill; or in default thereof, his Majesty's most gracious writ of *subpœna*," etc.

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## SECTION II.

### *Of the First Part of a Bill; and herein of the Doctrine of Relations.*

**224.** Having given this general view of the nature and form of a bill, we shall now draw the student's attention to its several parts, and add a few particular observations on each. In the appendix of common forms, will be found the different modes of address used in the several courts of equity, and also the formal words of commencement, according to the various capacities of the parties instituting the suit.

**225.** The additions and places of abode of the complainants should be specifically stated, both to prevent suits from being commenced in the names of fictitious persons, and also that the defendants may know where to resort for redress, in case the proceedings should be deemed vexatious, the practice of taking security for that purpose having been long since disused, except where the complainant *resides* out of the jurisdiction, when security for costs, to the amount of forty pounds,

(a) Mitf. 40. Wy. Prac. Reg. 82.

(b) The Attorney General may refuse to answer, and no process of contempt can go against him. 1 Dick. 730. *Davine v. Attorney General*. Exchequer, 1813.

will be required, on the defendant's motion. (a) In the exchequer, in order to give the court jurisdiction, the complainant states himself to be a debtor and accountant to his Majesty, which is similar to the practice at common law, and this is an averment not allowed to be traversed, and therefore mere form. A bill filed by a Peer always commences without affixing the epithet humbly; but simply—"complaining, sheweth unto your Lordship." The form for infants, married women, and lunatics, will be seen in the Appendix.

**226.** When the attorney general commences a suit, either on behalf of the crown or those under its protection, whether with or without a *relator* not personally interested, he proceeds by way of *information*, which differs in no respect from the form of a bill, except that it does not use the language either of complaint or petition; but merely, "informing, sheweth unto your Lordship, Sir A. B. knight, his Majesty's attorney general, on behalf," etc. If the *relator* be also a complainant, then the proceeding will be both information and bill; for the form of which, as also of informations in general, see the Appendix.

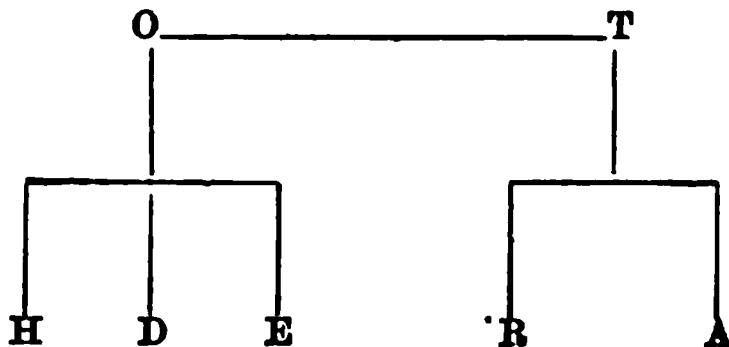
**227.** The two first parts, according to our division, are essential to every kind of bill whatever; as the first states the circumstances of the case, or the relative situation of the parties, and the second sets out the injury sustained, or the grievance likely to ensue, not remediable at common law, which is the ground of application for the interference of a court of equity. So far, the bill acts the part of a pleading, similar to the declaration at common law, and according with this view of it, is the definition given in the *Cursus Cancellariæ*; where it is said, "a bill in equity is in nature of a declaration at common law, wherein the complainant is to set forth the circumstances of his case for some fraud, force, or injury done to him, praying relief of the court, for that he has no remedy by the common law; and also process of *subpœna* against the de-

(a) Mos. 7. 11 Ves. 598. If the plaintiff describes himself in his bill of a place where he cannot be found, he must give security. 2 Fowl. Exch. Prac. 370.



fendant, to compel him to answer the charge of the bill. (a). The observations we have made, therefore, in the foregoing chapter relative to the mode of statement of injury, are entirely applicable to this part of a bill. We there showed that the plaintiff, in complaining of a wrong done to him, does nothing more than set forth a right of which he has been deprived; that rights are incident to relations, and that therefore to prove a right, the *relation* in which it is founded must be thoroughly understood. Relations, again, we have seen, let in three separate considerations: 1st, the *parties*, with their several disabilities and liabilities in law 2d, the subject matter or *contract*, with the circumstances under which it was made, and herein also of the nature of the property in litigation; and *lastly*, the legal and equitable incidents or *rights*, the withholding of any of which is the cause of complaint. (b) We shall here subjoin such additional instructions with regard to the doctrine of relations as may be generally useful to the pupil.

**228.** Relations may be divided into *primary or original—secondary or derivative—and collateral*. The first are those which subsist between the original parties; the second are such as are derived therefrom, either by the transmission of interest or the transfer of title or liability. Thus there is a primary relation between the mortgagor and mortgagee; but if the mortgagor assigns his equity of redemption, there then arises a new or secondary relation between the mortgage and the assignee of the equity. A collateral relation is that which exists between two or more derivative parties.



(a) Curs. Can. 36.

(b) *Vide ante*, p. 155-6.

Thus, in the figure above, let O and T stand for the parties to the original relation; let T be tenant for life, and R a remainderman; let A be an assignee, or alienee of T's interest; let H represent the heir at law to O; D be his devisee, and E executor. Here there will be a secondary relation between O and A, in respect of the *privity of contract* between T and A. There will be also a secondary relation between O and R, in respect of the *privity of estate* between T and R. Between T and H there will be a secondary relation, in respect of the *privity of blood* between O and H. So between T and D, in respect of the *privity of interest* between O and D; and in like manner between T and E, on account of the *privity of representation* between O and E. Again, H, D, and E on one side, and A and R on the other, stand in collateral relations to each other. Other derivative relations might be enumerated; but this will suffice at present for the purpose of illustration. The right understanding of these particulars is in the first place essential to the determination of the necessary parties to the suit, and the importance of this doctrine will be still further apparent when we come to treat of Supplemental Bills and Bills of Revivor.

**229.** The *original* relation may arise, either, 1st, out of a specific contract, the incidents of which must depend upon the terms of agreement, as in those cases where a *specific performance* is sought to be enforced; or, 2d, the relation may be such as though arising from contract between the parties, is nevertheless recognized and ascertained by the law, which attaches to it certain essential incidents and ingredients—such as the relation of partnership, of mortgagor and mortgagee, and the like; or, 3d, it may be produced by the act of a third person, as in the relation of executor and legatee; or, 4th, it may arise by the operation of law, as, for example, the relation between tenant in dower and heir at law.

In the *first* instance, as the nature of the relation is to be collected from the words of the contract, if the agreement be in writing, it must in general be set out *verbatim* in the bill; if not in writing, then such collateral circumstances must be

stated as raise a strong presumption in favor of its existence. On this point of the specific performance of parol agreements, various rules have been laid down in equity, with which the student should make himself acquainted, in order to frame his bill in cases of this nature. In the statement of specific contracts, the agreement must also be shown to be of such a kind as not to militate with general policy, (a) and that the stipulations contained in it are such as a court of equity ought in conscience to enforce. (b) The circumstances under which the agreement was made, form therefore, in most instances, a material part of the statement; and every fact should be set out, by way of inducement, tending to show that the consideration was valid and the terms fair and equitable; for it is a maxim, "that he that would have equity should do equity." (c)

In the *second* case above noticed, where the relation is one recognized by law, all the legal requisites to form such relation and the liabilities resulting from it, should be well understood, that the draftsman may be able to bring the case in the bill within the meaning of the law, and show such a breach as constitutes an injury cognizable in equity. As this kind of relation is founded in like manner as the former, on the contract of the parties, it will be subject to the same rules with regard to the equity of consideration and origin.

**230.** The same observations will apply to the 3d and 4th classes above enumerated, with this additional remark—that all the circumstances that led to the existing relation, must be succinctly alleged by way of preamble, both for the advantage of clearness of statement, and also in order to deduce the complainant's *title*.

This last is essential to every bill, and in general, it is to be remarked, there are four things indispensably requisite to be shown in the stating part, namely, 1st, the complainant's in-

(a) 9 Ves. 608. 1 Vern. 5.

(b) 2 Anst. 543.

(c) Curs. Can. 10. Hardr. 97.

terest (a) in the thing demanded; 2d, his title (b) to sue; 3d, the defendant's interest; (c) and 4th, his liability; (d) for, though there cannot be a title or a liability without an interest, there may be an interest without either. Thus, an executor, before he has proved the will, has an interest in the testator's chattels, but not such as to give him a title to sue; (e) so also an assignee has an interest in the thing assigned, although not liable to be sued for breach of covenant, unless such covenant runs with the land. (f) We do not here speak of the title or liability with reference to those defects which are the proper subject of *abatement*; but the title and liability, as derived from the very relation itself, and which therefore must appear on the face of it, if the relation be adequately stated; which title Lord Coke defines to be "*justa causa possidendi quod nostrum est.*" And he says: "*dicitur titulus a tuendo;*" because by it a man holds and *defends* his right. (g) It is necessary, however, to observe, that the title thus deduced, must not appear by the bill to be affected by any personal disability; and the defendant must be liable in the court of equity where the suit is instituted.

**231.** In deducing the title in the *third* class of original relations, it will be seen that such a preamble is necessary as will show that the person creating the relation had the power to do so, whether by *law* or by express *power* in a deed. In the first case the capacity in law is all that need be stated—as, for example, "that the testator was, at the time of making his will, and at his death, *seized* of or entitled to *freehold estate*, and *possessed* of personal property; and being of sound and disposing mind, made and published his will, with the usual formalities." With regard to the execution of a *power* created by deed, it will in general be requisite to set out the

(a) 2 Atk. 210.

(b) 1 Vern. 175. 9 P. Wms. 371.

(c) 2 Eq. Ca. Ab. 78. 2 Vern. 380.

(d) 1 Vern. 180. 1 Ves. 56.

(e) 1 P. Wms. 172, 766.

(f) 1 Ves. 56.

(g) *Vide* Co. Litt. 345, b.

power in *hæc verba*, since a question may turn on its extent or validity; and if the latter be likely to be contested. the preamble should go back to the origin of the instrument containing the power. Indeed, the student will observe that the preamble must, in a great measure, depend upon his discretion, always making it consistent with clearness of explanation, and such as may assist the complainant's title, by discovery from the defendant, if any ambiguity in the title render such detail necessary; but upon the face of the statement, at least a *prima facie* title must appear. In like manner, the draftsman must use his discretion as to whether the whole or any part of the instrument creating the relation be set out *totidem verbis*; having this general rule to guide him, that it is usually unnecessary, and therefore improper, to state more than the substance, unless where the duty claimed depends upon the very words of the instrument.

**232.** With respect to relations arising by operation of law, we need only observe that the progress of the operation should be traced from the prior relation to its subsequent effect, and the circumstances must be shown to be such as that the legal results necessarily ensue.

From the foregoing remarks the student must feel conscious how necessary it is to have a clear and just conception of the nature of the relation which is to be the subject of his statement, with all its legal and equitable incidents, before he sits down to draw the bill; for, as the nature of the injury must be derived from the incidents of the relation, so the form of the statement must depend upon the nature of the injury; if it be the deprivation of a right issuing out of the express contract of the parties, the terms of the contract will be essential; if, on the other hand, the right demanded is one given by law, the statement, to be adequate, must bring the case within the relation affected by the legal or equitable incidents.

## SECTION III.

*Of the Second Part, or Statement of Injury.*

**233.** The point next to be considered is, what circumstance in the case it is which produces the injury, or causes the hardship against which the complainant seeks relief; and this must arise from the state of the relation between the parties, either where a duty flowing from it is withheld, which, though binding in conscience, yet the ordinary courts have not power to enforce; or where the relative situation of the parties is such, whether from fraud or accident, or any other cause, as that a manifest wrong, or even probable injustice or inconvenience would ensue, but for the interference and assistance of a court of equity in compelling a discovery and supplying the adequate remedy.

**234.** This statement of grievance forms the second part of the bill, according to our division, corresponding to the breach in the declaration at common law, and should be made with brevity and succinctness. When the injury sought to be redressed is occasioned by the subtraction of a duty on the part of the defendant, this part of the bill merely contains a statement of *request and refusal*, viz: that various applications were made to the defendant, requesting him to do justice to the complainant and restore to him the right demanded, or perform the duty withheld, which nevertheless he has refused to do. The refusal is most commonly ushered in by the formal charge of confederacy, which, though usually inserted, is altogether unnecessary, [a] as new parties may be added at any period of the suit, without any such charge in the bill; and, therefore, in amicable suits, the refusal is stated without charging combination, and this form is invariably omitted where the defendant is a peer of the realm. [b]

**235.** In those cases, on the other hand, where the grievance arises out of the peculiar situation of the parties, the complainant having explained by his statement their relative

[a] 1 Anstr. 82.

[b] Mitf. 33.

position, goes on in this part of his bill briefly to show the nature of the difficulty resulting from it, or the hardship likely to ensue unless a court of equity interposes to his relief. "To the end, therefore," etc. Here, then, the student will observe, as no refusal is stated, of course the introductory charge of confederacy has no place; and, in like manner, as the necessity for the interference of a court of equity is embodied in the very statement of grievance, the formal clause of equity, as it is called, commencing: "And for as much as your orator is without remedy in the premises," is also omitted. In the statement of the injury for which redress is sought, it is obvious that the draftsman must be previously acquainted with the extent of the jurisdiction of the court; and to this point the student should turn his particular attention, in order that he may be able to set forth such a grievance in his bill as a court of equity will take cognizance of; for the mere averment that there is no remedy but in equity will not avail, unless it appear also on the face of the statement that the case is such that the court of chancery can compel a discovery or decree relief.

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#### SECTION IV.

##### *Of the Third Part, or Pretences and Charges.*

**236.** We next come to the pretences and charges, the nature and utility of which have been already pointed out. As the two former parts belong to a bill, as a *pleading*, in common with the declaration at law, so this *third* part has a peculiar reference to its character as an *examination*. One of the principal advantages attendant upon the mode of proceeding in chancery, is that the complainant is entitled to have an answer upon oath from the defendant, as to all the facts stated in the bill; but as it is a maxim in our law that no man shall be bound to criminate himself, care must be taken that no allegation be made which would subject the defendant, if admitted by him, to a penalty or forfeiture, [a] unless, indeed, the

[a] 1 Bro. C. C. 98. 1 Atk. 529. 2 Atk. 392. 2 Ves. 109.

forfeiture be one thereby accruing to the complainant himself, and that he specifically waives his right to it, [a] for the sake of the discovery. So far, then, as the defendant admits the facts alleged in the bill, it precludes the necessity of having them proved in evidence; as, on the other hand, if there be an unequivocal denial on the part of the defendant, two witnesses, at least, are required to establish the fact against his oath. [b] One of the chief objects of the draftsman's care, therefore, should be to charge in his bill all such material circumstances of the case as may tend to draw forth from the defendant an admission of the principal matters, and so avoid the necessity of proving them by depositions. [c]

**237.** This, then, is the peculiar province of the charging part of the bill; for if the same were attempted to be done in the statement, it would interrupt its course and render that confused, the chief quality of which should be clearness and intelligibility. But this, though the principal, is not the only end of the charging part, for as the relief sought frequently consists of a variety of particulars, the charges are sometimes made to support a part of the prayer. Thus, the circumstances which warrant the application for an injunction are generally stated in the charging part. Again, if it be anticipated that the defendant has any matter of avoidance to set up against the statement of complaint, whatever will operate to rebut that avoidance should be stated by way of charge,

[a] 1 Vern. 109-129. 1 Chan. Rep. 144.

[b] 2 Chan. Ca. 8. 1 Vern. 161. 3 Atk. 649, 270.

[c] It is the usual practice in Ireland to call upon the defendant to admit the authenticity of such deeds or other writings as are mentioned in the body of the bill, and which for that purpose are produced to him at the time of taking his answer. This appears to be both convenient and correct, upon the principle above stated, as it saves the necessity of having them proved as *exhibits*, by witnesses. The clause in the bill to this effect is introduced immediately preceding the prayer, of which the following is a general form:

"And that the said defendant may view in the hands of your orator's clerk in court, or commissioners (according to his mode of answering), the aforesaid writings, which should for that purpose be exhibited to him, and set forth of whose handwriting the same, or any and which of them, as he believes, are: And that," etc.



founded upon the supposed reasons of the defendant for *refusing* to accede to the complainant's reasonable requests; (a) and in this respect the charging part supersedes the use of a special replication, and, as far as regards discovery, is somewhat similar to a cross-examination.

238. Hence we may collect, that the difference between the stating and charging parts of the bill, is, that the first is confined to simply unfolding the nature of the relation clearly and concisely, containing such matters of inducement as are requisite for explanation and for deducing the title; the latter is used for the purpose of adding all such further facts and allegations which cannot be conveniently inserted in the statement, and which yet are material, either to extract *admissions* from the defendant, or to obtain *collateral relief*; or, lastly to *anticipate* the defence. In fact, it being a question of arrangement only, much must be left to the sagacity and discretion of the draftsman, in determining which part of the bill he shall choose for making any particular statement, since the pretences and charges are made a separate part of the bill, more for the sake of the "*lucidus ordo*" than from any real distinction existing, other than that we have noticed above. [b] In many cases, therefore, this part may be altogether passed over; and the foregoing observations will serve to instruct the pupil when charges should be introduced and when they may be omitted.

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## SECTION V.

### *Of the Fourth, or Interrogating Part, and Prayer.*

239. Of the conclusion (which, as we have elsewhere remarked, is but a single sentence), the groundwork is the prayer for a *subpœna*, adding a statement of the purposes for

[a] Mitf. 34-5.

[b] Lord Kenyon, in the bills he drew when at the bar, never put in the *charging* part, which does little more than unfold and enlarge the statement. Madd. Prac. 169; and *Patridge v. Haycraft*, 11 Ves. 574, there cited.

which the writ is required. *These* are in ordinary bills: first, that the defendant may be compelled to attend, in order to *answer* distinctly the several points of the bill; and, second, that upon a view of the case the court may interpose its authority to prevent or redress immediate wrong; or it may *decide* upon the ultimate claims of the parties, and enforce its decree by process of execution.

**240.** By the words of the bill, the defendant is required to give "full, true, perfect and distinct answers upon oath, to all and singular the matters stated and charged in the bill, as if he were distinctly interrogated to each;" and this he must do, whether there be interrogatories or not. At first view, therefore, the repetition of the whole bill by way of interrogation would appear a very useless prolixity. But experience has proved the utility of this practice beyond cavil; for the contrary method would not fail to produce still greater expense and delay to the parties, by occasioning frequent and numerous exceptions and amendments. The statement must, of necessity, be direct and positive; and if the defendant thought it his interest to do so, he might content himself with answering it according to the letter. But in most instances such a mode of answering would be perfectly evasive, and leave the substance of the charge quite untouched. [a] Thus, for instance, if the defendant were charged with having received a specific sum of money at a particular time, although he may have actually received the money, yet he might with strict truth deny his having received the *precise* sum, or at the *time*, or in the *manner* specified. The possibility of evasion is, however, obviated, by putting the statement into the form of an interrogatory, with all the concomitant alternatives: as, "whether the defendant did not receive that particular sum, or some, and what other sum of money, at the particular time mentioned, or at some and what other time, and in the manner specified, or how otherwise."

**241.** The great object of the interrogating part of the bill is, therefore, to preclude evasiveness in the answer; and the

[a] Mitf. 36.

whole attention of the draftsman must be turned to this single point of putting the question in every variety of form, to elicit a full and definite reply, and to prevent the defendant's having any loophole to escape upon a *negative pregnant*. In fact, this part of the bill is altogether subservient to the office which the bill performs, of an examination, and should therefore omit nothing essential to the proof and elucidation of the statement; but as the substance of the bill is, in fact, the thing to be answered, and the interrogatories are only permitted for the sake of convenience, no question can be put which is not immediately dependent on, or relevant to, a particular statement or charge in the bill. [a]

**242.** With the foregoing reservation, however, whatever may be important to the complainant as matter of discovery to support his case, without his being compelled to resort to extraneous evidence, may and ought to be interrogated to, since one of the principal ends of a bill taken as an examination, is to supersede the necessity of proof. Thus, in a bill for an account, the nature, value and amount of the property charged to have come into the defendant's hand may be inquired into, and how every part has been disposed of; and if any remains in the defendant's hands, how it is employed; and every other circumstance which may be of service in taking the account required. [b]

**243.** This is, however, only subsidiary to the decree, and therefore the bill goes on to state, as the *second purpose* for which the writ is prayed, that the defendant may be compelled to account under the decree of the court, in nearly the same words. We have thought it right to make this remark here, because it is apt to appear strange to the pupil that in one sentence the defendant is called upon to account with the complainant, and in the next, almost the same terms are used, that an account may be taken under the direction of the court. But the foregoing observations will have explained that there

[a] Mitf. 35-6. 4 Bro. C. C. 458. 6 Ves. 62-3. 11 Ves. 273.

[b] 10 Ves. 290. 11 Ves. 301.

are two purposes or *ends* for which the writ of *subpœna* is required: first, for discovery; and, second, for the interference of the court, expressed by its order or decree; and that each of these are distinct.

**244.** We now come to the latter *purpose*, the statement of which is usually, though improperly, the "*prayer for relief*." On examining the structure of a bill, the student will see that the only prayer contained in it is that for the *subpœna*, and that the clause of which we are now treating is inserted in order to show to the court how far, and in what respect, its assistance is required. This is essential, in order to point out to the court and opposite party the definite object for which the bill is filed, that the former may know distinctly what it is called upon to decide, and the latter what to defend.

**245.** At common law, the settled forms of action render this part unnecessary in the declaration, as every case has its express remedy provided; but it is otherwise in equity, where the mode and degree of relief cannot, from the nature of the thing, be bounded or prescribed by any determinate rules, but must be adjusted to the circumstances of every individual case, "*secundum æquum et bonum*." In the former instance, the premises allowed, the law draws the inevitable conclusion; in the latter, the inference is deduced from reason and conscience. It is therefore proper that the complainant in his bill shall not leave this inference to be vaguely collected from a diffuse and sometimes indeterminate statement; but that the party who is aggrieved should himself set forth the nature of the redress which he seeks; and it is sometimes material, even as a medium of construction, for explaining equivocal charges in the body of the bill. (a)

**246.** The relief sought, again, subdivides itself into two kinds: first, the collateral and auxiliary assistance of the court for the redress of immediate and prevention of threatened injury, pending a course of litigation, or the avoiding a

(a) 18 Ves. 80.

probable future grievance—such as an injunction, a “*ne exeat regno*,” a commission to examine witnesses who are abroad, in aid of a trial at law, and the examination of witnesses “*in perpetuam rei memoriam*.” The second species of relief is that which is properly so called, and is founded upon the *decree* of the court, pronounced upon hearing and deciding on the ultimate claims of the respective parties.

**247.** A bill may be framed for all or any of these purposes conjointly, as for an answer and injunction, or an answer, injunction and decree; only it is to be observed that such original bills as call for the decree of the court are alone termed *bills for relief*. In many instances a complainant is entitled to a discovery, and even to the collateral aid of the court by injunction, or an order for a commission, etc., where the court could not *decree* relief; and in such case care must be taken not to frame the bill as a *bill for relief*, for otherwise it would be demurrable. (a) Hence the student must be acquainted with the nature and extent of the authority of a court of equity, as well as with the subjects of its jurisdiction; that from the one he may learn what injuries the court can redress, from the other, the manner of effecting it. Upon this, and the nature of the injury sustained, or the grievance complained of, must depend the form of the remedy to be applied. If it be an injury arising from the subtraction of a duty, the direct and substantial relief will be a decree for the restoration of the right (wherever that can be effected), accompanied by such ancillary directions as will tend to effectuate that object. If the assistance of the court be required to redress a grievance, or remove a difficulty flowing out of the relative situation of the parties, then such relief must be sought as accords with the practice of the court, ascertained by a series of decisions in similar or analogous cases.

**248.** After the statement of the particular relief sought, there is always added a general suggestion that the complainant “may have such further or other relief in the premises as

(a) 2 Bro. C. C. 319. 6 Ves. 62. 11 Ves. 509. 2 Ves. & Beaum., 328.

the nature and circumstances of the case may require;" and the court, acting upon this suggestion, will vary the relief according to its discretion, so as to meet the justice of the case; (a) *provided*, such relief be not *incompatible* with that sought by the bill; (b) and the reason of this last rule is, that as the relief required must grow out of the statement of the injury sustained, of the nature of which, therefore, it will be a fair construction, it would be absurd as well as unjust towards the defendant to make a decree in favor of the complainant inconsistent with his own case. But there is an exception to this rule in the case of an information by the attorney general, suing on behalf of a charity, (c) or where a bill is filed by an infant; (d) in the former instance, because the interests of the charity ought not to suffer from the neglect or default of a public officer; in the latter, because an infant, having no discretion of his own, the court is bound to protect his rights, without any regard to mistake or error in point of form. The draftsman should therefore use the utmost caution in this part of the bill; and if he doubts the complainant's title to the relief he wishes to pray, the bill may be framed with a double aspect, that if the court determines against him in one view of the case, it may yet afford him assistance in another. (e)

(a) 2 Ves. Jun. 401. 5 Ves. 495.

(b) 2 Atk. 141. 1 Ves. Jun. 426. 3 Ves. 416. 12 Ves. 48. 13 Ves. 114

(c) 1 Atk. 355. 2 Ves. 426. 11 Ves. 247, 367.

(d) 1 Atk. 6.

(e) Mitf. 31. 2 Atk. 325. 6 Ves. 53

## CHAPTER III.

## Of Secondary Bills.

**249.** Having thus gone through the several parts of an ordinary bill, it only remains to notice some peculiarities in the structure of such bills as are not original, but which are the consequence of, or have some reference to, a former bill; and the peculiarities we shall point out in each, will at the same time be illustrative of the general doctrine.

**250.** In the progress of a suit, circumstances may arise which will cause such a change in the state of the relation between the parties as to render it necessary to add new incidents to the former relation, or to state an entirely new relation, which will, however, have a *reference* to the former, inasmuch as it grows out of the former subject of litigation. The same may likewise occur after the termination of a suit, and before the execution of the decree. In any of these cases a new bill must be filed, which, as it of course *refers* to the former bill, and the subsequent proceedings thereon, is therefore distinguished from the original bill, and termed "*not original*." So far as such bill merely adds new incidents to a still subsisting relation, it is *supplemental*; where it states a new relation between new parties, it is either *a revivor*, or *in the nature of revivor*, or *supplement*.

**251.** We have already seen (a) that the use of a supplemental bill is either, 1st, to supply the place of amendment at that state of the proceedings when amendment will not be permitted, or, 2d, to *add* such circumstances which have occurred subsequent to the filing of the original bill, as may either have caused a change in the terms of the relation subsisting between the *original* parties, and consequently in the rights and duties flowing from it; or an alteration in the par-

(a) *Vide ante*, P. 1, cap. 16.

ties, by means of which new parties to the suit must be brought before the court. From this circumstance of the alteration of the *parties* to the relation, the principal difficulty arises as to when a suit becomes *abated*, and when merely *defective*, and consequently in what cases a supplemental bill will suffice. We shall here, therefore, endeavor to apply the principles we before laid down concerning relations, as an attempt at a solution of the present difficulty.

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### SECTION I.

*Of Abatement, and the Distinction between Suits abated, and those become merely defective.*

**252.** All persons who have such an interest in the matters in litigation, as that their rights might be affected by the decree, should strictly be parties to the suit. (a) This is the general rule adopted by a court of equity, which, as it does not confine its decree to the mere decision of the question at issue between the principal parties, but determines all points of controversy which may arise out of the principal question, and gives direction thereupon, which may affect persons remotely or consequentially concerned in interest, will not make such decree, unless the persons so concerned are brought before the court, to assert or defend their particular rights. (b)

**253.** This rule, however, is not so strict but that it may in some cases, be dispensed with—as where, from the multitude of the parties, it would be inconvenient or impracticable—“the court preferring to go as far as possible towards justice, rather than to deny it altogether.” (c) So, where the interest of the party is very remote, (d) or his rights depend upon the establishment of prior claims, (e) or where there is already before

(a) 2 Eq. Ca. Abr. 176. 2 Atk. 296, 515. 7 Ves. 563. 1 Meriv. 262. 16 Ves. 325.

(b) 3 P. Wms. 333. Mit. 134.

(c) 16 Ves. 320: per Ld. Eldon, C.

(d) 2 Eq. Ca. Abr. 166. Mitf. 139.

(e) Mitf. 142. 2 Vern. 527. Amb. 564. 16 Ves. 327.



the court a person competent to protect them, and in general it may be put negatively, that none are required to be parties who are not bound by the decree, [a] as, on the other hand, none are bound by the decree who are not parties to the suit. [b]

**254.** Thus, then, all persons whose *rights* are necessarily involved in the litigation before the court, are necessary parties. But their *rights* must flow from some *relation* existing between them and the principal parties to the suit. Relations, we have seen, are either, first, *original*; or, second, *derivative*; or, third, *collateral*; [c] It is clear that all those who are parties to the original relation must also be parties to the suit commenced by any of them touching such relation, or the incidents belonging to it, unless such parties as may be passed over from remoteness of interest—as a remainder-man, after a vested estate of inheritance. [d] So all *derivative* parties, so far as their newly acquired rights may be affected by the question between the original parties, or their acquisition of new rights may affect the original rights. So, likewise, if a *derivative* party commence a suit against any of the original parties, it may be necessary to bring his *collaterals* before the court, if their collateral rights may be endangered or called in question by the suit—as where the devisee is compelled to make the heir-at-law a party when he claims to have the will established. [e] It is upon collateral rights that cross-bills are generally filed.

**255.** We have thus far ascertained, at least in general terms, what parties ought to be named in the original bill; and if any such should be omitted, they may be added at any period afterwards, by way of amendment. [f] But where any of the parties to the original relation come into existence after the bill is filed—as on the birth of a tenant in tail, [g] or

[a] 3 P. Wms. 310, in note.

[b] 1 Ball. & Beatty, 447.

[c] *Vide ante*, p. 198.

[d] Mitf. 141.

[e] 2 Ves. 431.

[f] *Vide ante*, p. 65-6.

[g] Mitf. 49.

where the *derivative* relation, which makes the addition of a new party necessary, is created subsequent to the commencement of the suit; or if the *collateral* relation accrues by an event subsequent, there must be a *supplemental* bill to bring such new parties before the court. [a] This is, however, only in case the new parties are required to be *added* merely to the original suit, and who should have been named as parties in the original bill, or might have been made parties by amendment afterwards, had such parties been in existence, or had the derivative or collateral relation occurred before the bill was filed; and this is the true test for ascertaining when new parties may be *added* by supplement merely.

**256.** Abatement is either *of the suit*, or *as to a party*. A suit is said to abate when, in consequence of some event, there is no longer any person before the court, by or against whom the proceedings can be carried forward. Abatement as to a party is, where the interest and title, or liability of the party, having ceased, it is no longer necessary to have such party before the court. When, in consequence of some derivative relation, a new party is required to be *substituted* in the room of one of the original parties, and not *added* only, it is clear that the substitution works an abatement, as far as regards the original party. Now, derivative relations are produced, either, first, by the death of a party; second, by a voluntary transfer of interest; third, by the act of law; or, lastly, by succession.

**257.** As to the *first*, it is obvious that where derivative rights have devolved upon a new party by the *death* of an original party, there is necessarily an abatement as to the *party*, and the substitution of the new party will be a revivor as to him; but unless the deceased had been a *sole* complainant or defendant, even though he be a *principal* party, the *suit* has not abated by the death, because there are still before the court parties, by or against whom the proceedings may be carried forward. Nevertheless, if in such case the interest of

[a] *Ante*, p. 137.

the deceased party is transmitted to his representatives, so that it is necessary to have such representatives before the court, the suit becomes to that extent *defective*, and can only be continued by a revivor as to the representatives of the deceased party. [a]

**258.** A derivative relation, by the voluntary act of the party, can only be created by an assignment of interest in the matters in litigation; if it be an assignment of part only of his interest, the new party, in respect of his new rights, ought to be *added* to the suit, by way of supplement; and here it is clear there is no abatement. If the assignment be of the party's whole *interest*, as it is no longer necessary to have such party before the court, there will be an abatement as to the party whenever the assignee is substituted, but not until then, for, in effect, if the alienation of the property *pendente lite* be not disclosed, the suit will proceed without the addition or substitution of the derivative parties, who will, notwithstanding, be bound by the decree, since they thus tacitly submit to purchase the property, under all its circumstances of hazard, and subject to the event of the suit. [b] If, therefore, their newly acquired rights are materially affected by the decree, their only remedy will be an original bill, something in the nature of a cross bill. [c] On the other hand, if their newly acquired rights so far affect the original rights as that the decree cannot be put in force without making them parties, on this fact being discovered they must be added by supplemental bill, to carry the decree into execution. [d]

**259.** Thus, though when a party assigns his whole interest *pendente lite*, and the assignee is made party to the suit in his room, there is an abatement *as to the party* assignor; yet in no case, even where the party assigning his whole interest is sole complainant, does such assignment cause *ipso facto* an abate-

[a] *Vide* Dict. in *Boddy v. Kent*, 1 Meriv. 564.

[b] "*Pendente lite nihil innovetur.*" Co. Litt. 344, b. and *vide* 2 Atk. 174. Ambler. 676. 11 Ves. 195. 2 Ves. & Beames, 204, *et seq.*

[c] Mitf. 58. 2 Atk. 174. 3 Atk. 57.

[d] Mitf. 57.

*ment of the suit*; for an abatement of the suit only happens where there is no longer any person before the court, by or against whom the proceedings can be carried forward. But we have just seen that the suit may be proceeded with, notwithstanding the assignment of the party's *entire* interest. Indeed, the principle is carried to such an extent that it seems a man may bring two bills at his own expense, making use of the name of his assignor in one; nor can the court say he shall be stopped in that one. [a]

**260.** If, indeed, the suit be proceeded with, notwithstanding the assignment, and such assignment be known, the want of interest may be used in the defence as a plea in bar; and, therefore, if the assignment be on the part of a *sole complainant*, the suit in his name will necessarily be rendered ineffectual, not because there is no longer before the court a person competent to conduct it, but because the *cause of action* is transferred to another. This, though it in effect puts an end to the suit, is not, however, an *abatement*, and if three terms elapse without any further proceeding, the bill may be dismissed. The assignee of the complainant may, in the meantime, however, commence a *new suit* in respect of his acquired interest, which will have a reference, so far, to the original proceedings, as that he may crave the benefit of them. The bill necessary to be filed by the assignee of a sole complainant, therefore, will be an *original bill*, in the nature of a *supplemental bill*. [b]

**261.** If the assignment be on the part of a *sole defendant*, though there is an abatement *as to the party*, there is no abatement *of the suit*, and consequently the complainant may file a bill, stating the change of interest which has occurred, and substituting the assignee as the new defendant; but such bill being only in continuation of the former, will be *supplemental* merely, though in the nature of a bill of revivor, so far as regards the abatement as to the party.

[a] Ambl. 546.

[b] Mitf. 51.

**262.** This difference between a sole complainant and a sole defendant is farther accounted for on this principle, that the defendant shall not be allowed to take advantage of his own act to bar the complainant's right during the pendency of a suit, but the suit will continue against the assignee of the interest, who takes it with all the liabilities attached. [a] The distinction between the marriage of a feme plaintiff and a feme defendant, as it affects the suit, rests upon similar grounds. If a *feme plaintiff* marries *pendente lite*, although her interest in the subject of litigation be not gone, yet she voluntarily deprives herself of all *title* to sue alone, in consequence of which the suit becomes abated, and the husband, *jure uxoris*, together with the wife in respect of the *interest* remaining in her (being but one person in contemplation of law), must be *substituted* for the feme sole complainant, by revivor. [b] On the other hand, a feme sole defendant cannot by her own voluntary act discharge herself from liability; [c] but such liability is annexed to the person of her husband, who should therefore be named in all subsequent proceedings; [d] and such is manifestly no abatement of the suit.

**263.** In general terms, it may be stated, that no circumstance causes an abatement of a suit, which would not be valid as a plea in abatement, although such circumstance may produce an abatement *as to a party*, and although the suit may thereby be *barred*. It is a want of attention to this distinction between a suit being *abated* and a suit being *barred*, which has caused all the uncertainty and contradiction as to the effect of bankruptcy, or insolvency, pending a suit. [e]

**264.** The property of a bankrupt, or insolvent, is, by law, transferred to assignees, chosen in a particular way, who hold such property *in trust* for the benefit of the creditors, and ultimately for the bankrupt or insolvent. [f] This transfer of

[a] Ambli. 678. 2 Ves. & Beames, 200.

[b] 1 Vern. 318. 1 Ves. 182.

[c] Beames' Pleas, 283. Gilb. For. Rom. 174, 175.

[d] *Ibid.*

[e] *Vide* Beames' El. of Pleas, 286, *et seq.*, and the cases there cited.

[f] 6 Ves. 485. 15 Ves. 8.

property produces the third class of derivative relations above enumerated, namely, *by act of law*. Now bankruptcy, or insolvency, can only be taken advantage of by *plea in bar*, [a] and consequently they cause no *abatement* of the suit. [b] Nor do they even, strictly speaking, produce an abatement *as to the party*, for as the assignees are in the character of trustees, they hold the property committed to them, not in their own right, but in the right of the bankrupt or insolvent, and are the representatives of whatever interest remains in him. That some interest continues in him is clear, for after payment of his debts he will be entitled to the surplus of property, if any; [c] and in some instances the bankrupt is permitted to follow up the suit in his own name, [d] though in such case he must bring the assignees before the court. [e] In all cases, therefore, even where the bankrupt or insolvent is the *sole complainant*, his assignees may come before the court and have the benefit of the former proceedings, by supplemental bill; [f] for as they come in merely in a representative character, it is rather a change of *persons* than of *parties* to the suit, which remains exactly in the same condition as before. For the same reason, if any parties, suing or sued *en auter droit*, are changed or removed, their successors in the *same right* continue the litigation by supplement only. [g]

**265.** The last species of derivative relations mentioned above is that which accrues by *succession*, or where a new party comes in to the same interest, but by a different title—as in the case of succession to a benefice. This must happen either by the death or removal of the former party. On the

[a] Mr. Beames classes bankruptcy and insolvency among pleas to the person; in which he professes to follow Lord Redesdale. (El. Pleas, 120.) But Lord Redesdale expressly makes it a plea in bar, under the head of *want of interest*. Mitf. 189; and see the next chapter.

[b] Cooper, Tr. 76.

[c] 15 Ves. 8.

[d] Mitf. 52. 1 Atk. 263.

[e] 18 Ves. 424.

[f] Coop. Tr. 76; and see 1 Ves. & Beames, 500. See 1 Atk. 263. 4 Ves. 27.

[g] 1 Atk. 88. 3 Atk. 218.

principles already established, it is clear that in case of death the suit is abated; in case of removal, the suit is barred; and in all cases there is an abatement as to the party when the successor is *substituted*. Here, therefore, the parties must commence the proceedings *de novo*, and the original proceedings will be of no further avail than that, on being referred to, they may be a groundwork for the court to adopt similar proceedings in the new suit. [a] Such original bill is therefore said to be in the nature of a supplemental bill.

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## SECTION II.

### *Of the Form and Structure of Supplemental Bills.*

**266.** The subject of every kind of bill, is the statement of some grievance or hardship, arising out of the relative position of the parties, and the grounds on which it calls upon the court for relief. Now, in a supplemental bill, the grievance complained of is, that there exists some defect in the suit already before the court, by means of which complete justice cannot be attained; but which, nevertheless, cannot, from the nature of it, or from the state of the proceedings, be remedied in the ordinary way of amendment.

**267.** We have seen, that the bill should, in all cases, commence by stating the relation between the parties; and next deduce therefrom cause of complaint. In a supplemental bill, the cause of complaint grows out of the position of the parties to the original suit, and therefore the statement of the *relation* in a supplemental bill, will be a statement of the original bill, and of the proceedings thereon; the statement of *grievance* will be of the new matter which causes the defect in the original suit. This is always introduced by the words: "and your orator further sheweth, by way of supplement, to your Lordship." The bill then proceeds to pray for a *subpœna*, to the end that the defendant may answer the new supplemental matter thus put in issue, and that the court may grant further

[a] Mitf. 57; and see 9 Ves. 37 to 67.

relief, grounded on the supplemental statement; or if the defect in the suit arises from a change of parties, a *subpoena* is prayed against the new parties, to the end that they may answer the premises, and that the complainant may have the benefit of the former proceedings as against them, and the same relief as he would be entitled to against the original parties.

268. Here it is obvious, the *third part* of the bill, according to our division, that which contains the pretences and charges, need in no case be inserted, unless where the supplemental matter seeks for further discovery; and the formal clause of equity, which suggests the jurisdiction of the court, is of course unnecessary, since the supplemental bill is only in continuation of the proceedings already before the court. Indeed it has been shown, in a former page, that these parts are not essential, even to the original bill; and thus a supplemental bill is, in all respects, analogous in its structure to an ordinary bill, and corroborates the principles we have before laid down concerning bills in general.

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### SECTION III.

#### *Of the Form and Structure of Bills of Revivor, and of Bills in the Nature of Bills of Revivor.*

269. In those cases where a bill of revivor may be filed, the hardship complained of is, that by the abatement of the suit, the complainant would be compelled to renew the same proceedings against persons who stand in precisely the same relation as the parties to the original suit, and against whom therefore he has the same claims, unless the court shall apply a remedy, by allowing the original proceedings to be *revived*, for or against the new parties. To make out such relation, therefore, the bill of revivor must state the original bill, and the proceedings upon it; and further, that the new parties hold exactly the same place in the original relation as the persons through whom they derive, and therefore are invested with similar rights and duties.



**270.** This is always the case where the new parties come in after abatement, *by the act of law*—such as the heir at law, who comes in as the representative of the deceased, in regard to his real estate; the executor or administrator, who represents him as far as regards the personalty; and the husband, *jure uxoris*, who must join with the *feme* plaintiff to sustain the suit. In all these cases, therefore, the relation will be sufficiently made out to give a title to revivor, by merely stating that the new party is the heir at law, or executor, or administrator, or the husband of the *feme* plaintiff, and there is no question put in issue but as to the person of the party. This is the case of a bill of revivor, properly so called, which thereupon proceeds to state, “that the complainant is, as he is advised, entitled to have the said suit revived against the defendant, and restored to the same plight and condition as previously to, and at the time of the abatement and therefore prays a *subpœna* against the defendant to appear and show cause, if he can, why the suit and proceedings should not stand and be revived against him, *to the end* that the suit may be revived.”

**271.** When the new party comes in after abatement, not by the act of law, but *by the act of the party*—as in the case of a devisee, who comes in under the will of the testator—to make out such a relation as will entitle to revive, it will be necessary to go one step farther, and to show not only the state of the former proceedings, and that the new party is the devisee, but also that *the act of the party*, by which the rights and duties have devolved upon him, is valid; and here, it is manifest, a considerable question is put in issue, until which is disposed of, either by admission or by proof, the title to revive is not fully established. This, therefore, is no longer a bill of revivor merely, but an *original bill in the nature of a bill of revivor*. This kind of bill, then, after showing the abatement and the transmission of interest to the new party, proceeds to state that, notwithstanding such abatement, the complainant is, as he is advised, entitled to have the same relief against the defendant as might have been decreed between the parties in the

original suit; and then expressly *charges* the validity of the instrument by which the interest of the new party has been transmitted.

**272.** Here we are furnished with an exemplification of what we have laid down in a former part of this chapter, concerning the nature and use of the *charging part* of a bill. Thus, the relation is here sufficiently made out, by merely showing the abatement and devise, so as to give a *prima facie* title, which is the proper function of the stating part of the bill; and the *charge* is introduced to anticipate and controvert the defence which may be set up, viz: that although such a devise was made, yet that it was not valid and effectual in law (as, for instance, that the testator was not empowered to dispose of his real estate by will); which brings the point at once to issue between the parties; and such, we have seen, is the peculiar province of the charging part.

**273.** The bill next goes on to pray for a *subpœna*, in the common form, *to the end* that the defendant may answer the premises, and that the same benefit may be had of the old suit as if it had not abated, or that the defendant may show good cause to the contrary.

**274.** A *supplemental bill in the nature of a bill of revivor*, is similar in principle to this last, except that, not being the consequence of an abatement of the suit, it partakes somewhat of the qualities of a supplemental and not an original bill.

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#### SECTION IV.

##### *Of the Form and Structure of the Original Bill in the Nature of a Supplemental Bill.*

**275.** In the bills we have just described, the mere statement of a valid transmission of interest to the new party is sufficient to establish such a relation as will give a title to the benefit of the former proceedings, because the new parties to such bills are derivative parties, by privity of blood, or repre-

*sentation*, or *contract*; and in such cases the derivative interest carries along with it the original title and liability. But where the new parties are derivative by privity of *estate* only—as in the case of a successor to a benefice, or of a remainderman to a tenant in tail, the acquisition of interest is not accompanied with either the old title or the old liability; but a *new* title, and a *new* liability will spring from the possession of the *estate*, which *may, perchance*, be similar to the former, as arising out of the same matter of litigation.

276. In such case, therefore, there must be a new suit altogether, and if in the new suit the injury complained of, and the redress sought, be similar to the former bill, in general the complainant will have the benefit of the former proceedings, so far as to have the new suit considered as supplemental to the original suit. To obtain this end, however, it will not be enough to show that there has been a transmission of interest, but it will be necessary to state such a new relation as will prove that the *new* title, or the *new* liability, is similar to the old, and that the complainant is in consequence entitled to the same or similar relief; or, in other words, that the new suit is the same in substance as the original one, and therefore may be made supplemental to it. This bears a strong analogy to the practice of consolidating suits, which is done on special motion for a reference to the master, to see if two suits are for the same purpose. [a]

277. The *Original Bill in the nature of a Supplemental Bill*, states, therefore, the original bill at full length, with the proceedings upon it; the manner in which the succession of interest has accrued; next, the circumstances which make the relation similar; and, finally, it prays for a *subpœna* against the defendant, *to the end* that he may answer the premises, and that the complainant may have similar relief against him to that which was prayed in the original bill.

[a] 16 Ves. 344.

## SECTION V.

*Of the Form and Structure of Bills in the Nature of Original Bills.*

**278.** We shall now briefly notice the structure of the remaining bills of such nature, that though they are strictly original bills, yet the injury they complain of proceeds out of a former suit. These are cross bills—bills of review—bills to set aside a decree obtained by fraud—bills to suspend a decree, and bills to carry a decree into execution.

**279.** A *cross bill* is a species of defence used for the purpose of obtaining a discovery necessary to the defence, [a] or when it would be too late to use the same defence by way of plea; [b] or, 'lastly, to obtain some relief founded on the collateral claims of the party defendant to the original suit. [c]

**280.** In the *first* of these cases, the former suit causes the relation on which is founded the right to discovery; and, consequently, that suit and the proceedings upon it must be stated in the cross bill. The discovery, when obtained, if material, must be added to the original answer by way of supplement; for the answer to the cross bill cannot be read as a defence at the hearing of the original cause. [d]

**281.** In the *second* instance, the cross bill is in the nature of a *plea puis darrein continuance*—as, for example, where some occurrence has happened after the cause is at issue, which would have been a good ground of plea in bar—such as a release from the plaintiff. Here the statement of *relation* is of the former bill and proceedings, and the new occurrence which creates the bar; the *injury* is, that the suit is notwithstanding proceeded with, and that the complainant, in the cross bill, cannot use the defence as a plea in bar; and he therefore prays a *subpœna*, to the end that the premises may be answered

[a] Mitf. 64. 3 Atk. 812. Mos. 332.

[b] Mitf. 64. 3 Ch. Rep. 19.

[c] 2 Cox, 78; and see *ante*, p. 39.

[d] 2 Ves. & Beames, 16.

and that the new defence may be declared a sufficient bar to any further proceedings; and that, therefore, the original bill may be forthwith dismissed with costs. This kind of cross bill is necessary, in order to put the new defence in issue, without which the court could have no judicial cognizance of it at the hearing. [a]

**282.** A cross bill, filed for the *last* purpose above mentioned, viz: for collateral relief, differs in no respect from the common form of an original bill, but must state the collateral relation—the injury sought to be redressed, in which part is generally included the reference to the former bill; pretences and charges, when necessary, being, for the most part, pretences of some of the allegations in the original bill, and charges to the contrary; and, lastly, the prayer for *subpœna*, to the end that the defendant may answer the premises, and the court may decree such relief as the nature of the case may require. As a cross bill is considered merely as a species of defence, [b] and concerns matters already in litigation before the court, it will not be necessary, at least as against the complainant to the original suit, to show any ground of equity to support the jurisdiction of the court. [c]

**283.** A bill of review is either on error apparent, or on discovery of new matter. [d] When it is brought for *error apparent*, after reciting the former proceedings, and the substance of the decree pronounced in which the error appears, it proceeds to state that “the said decree has since been duly signed and enrolled, and which said decree the complainant humbly insists is erroneous, and ought to be reviewed, reversed and set aside, for many apparent errors and imperfections, in as much as it appears,” etc. Then, after showing the errors relied on, a *subpœna* is prayed, to the end that the statement may be answered, and that the decree may be reviewed, reversed and set aside, and no further proceedings taken thereon.

[a] 3 Ch. Rep. 19.

[b] 3 Atk. 812. Mos. 382.

[c] Hardr. 160.

[d] *Vide ante*, p. 129.

**284.** When the bill of review is brought on the *discovery of new matter*, after stating the enrolment of the decree, the bill proceeds: "and your orator sheweth unto your Lordship, by leave of this honorable court first had and obtained for that purpose, by way of supplement, that since the signing of the said decree, your orator has discovered, as the fact is," etc., stating the new matter relied on as a ground for reviewing and reversing the decree. "And your orator is advised and humbly insists, under the circumstances aforesaid, that the said decree, in consequence of the discovery of such new matter as aforesaid, ought to be reviewed and reversed." It next prays a *subpœna*, to the end that the defendant may answer, and that the decree may be set aside; and that further directions be added, if required, on the supplemental matter, and for such general relief as the circumstances of the case may require.

**285.** A bill to impeach a decree on the ground of fraud, is in many respects similar to the last mentioned, only the circumstances explanatory of the fraud charged must be stated by way of inducement to the relation arising out of the proceedings, and the decree alleged to be fraudulently obtained. The complainant must then set out the circumstances of fraud under which the decree was obtained, and that having lately discovered the same, he applied to the defendant for redress, and not to insist on the decree. The *injury* complained of is, the defendant's refusal to comply with this request; to which is always added a pretence to the validity of the decree (which anticipates the defence), and a charge to controvert it; together with whatever other charges may corroborate the statement of fraud. The *subpœna* is prayed to the end that the defendant may put in his answer, and that the decree may be set aside and declared fraudulent and void, and for such other relief as the case may require.

**286.** The remaining two species of bills above enumerated viz: bills to *suspend*, and bills to *carry a decree into execution*, are merely in the nature of a petition in the cause; only that the cause being concluded by the pronouncing of the final de-

decree, the parties must be again brought before the court by an original bill.

In the former, the complainant must show the special circumstances on which he grounds his title to have the decree suspended; and then state that he is, as he is advised, entitled to have the decree, or part of it, suspended as against him, upon such equitable terms as he thereby offers, and so pray accordingly.

In the latter, the complainant must set out a sufficient reason why the decree has not been carried into execution, and also the circumstances which impede the execution of it at the time of filing the bill; and state that though "he is desirous of having the said decree forthwith carried into execution, yet, that from the circumstances aforesaid, he is advised that the same cannot be done without the assistance of the court;" which he prays accordingly, "and that the defendant may be ordered to do and concur in all necessary acts for that purpose."

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**287.** We have thus endeavored to explain in general terms the form and structure of a bill in chancery, so that the student may be at no loss to apply the general principles to the particular case which comes before him; and we have also pointed out the peculiarities in the frame of secondary bills, which, however, form no exception to the general rules, but are rather particular instances illustrative of the universal theory. As informations differ in no respect from ordinary bills, but in their form, we have not thought it necessary to give them a separate consideration. It only remains for us at present to add such orders in chancery as relate to the mere drawing of the bill.

**288.** In Lord Bacon's Ordinances, published in open court in the year 1618, the 55th and 56th sections are as follows: "55. If any bill, answer, replication, or rejoinder, shall be

found of an immoderate length, both the party, and the counsel under whose hand it passed, shall be fined." [a] "56. If there be contained in any bill, answer, or other pleadings or interrogatory, any matter libellous or slanderous against any that is not party to the suit, or against such as are parties to the suit, upon matters impertinent, or in derogation of the settled authorities of any of his Majesty's courts, such bills, answers, pleadings, or interrogatories, shall be taken off the file and suppressed, and the parties severally punished by commitment or ignominy, as shall be thought fit, for the abuse of the court; and the counsellors at law who have set their hands, shall likewise receive reproof or punishment, if cause be." [b]

289. These regulations were further enlarged by Lord Coventry in the orders published by him, A. D. 1635, [c] and subsequently adopted by Lord Clarendon, in 1661. [d] In the collection of rules and orders that go under his name, under the title "Bills," it is ordered, "That no counsellor do put his hand to any bill, answer, or other pleading, unless it be drawn, or at least perused by himself in the paper draft, before it be engrossed (which they shall do well for their own discharge to sign also after perusal), and counsel are to take care that the same be not stuffed with repetition of deeds, writings, or records *in hæc verba*; but the effect and substance of so much of them only as it is pertinent and material to be set down; and that in brief terms, without long and needless traverses of points not traversable, tautologies, multiplication of words, or other impertinencies, occasioning needless prolixity; to the end, the ancient brevity and succinctness in bills and other pleadings may be restored and observed; much less may any counsel insert therein matter merely criminous or scandalous, under the penalty of good costs to be laid on such counsel, to be paid to the party grieved, before such counsel be heard in court." "If there be matter scandalous in a bill, a master of chancery

[a] Beames' Ord. Chan. 25.

[b] Ibid.

[c] Beames' Ord. Chan. 69.

[d] Beames' Ord. Chan. 165.



is to expunge it, and to tax costs for the party scandalized; but if on such reference the master reports the bill not scandalous, the party procuring such reference shall pay costs to the plaintiff for such his reference."

## CHAPTER IV.

## Pleas and Demurrers.

**290.** We now come to those pleadings which are used on the defence, and which either submit to answer and contest the suit, or which show some reason why the defendant is not called upon to answer; as that the court has not *jurisdiction*; or that the suit has *abated*, or is *defective*, or *barred*. When the defendant submits to contest the suit, he puts in an *answer*; he shows cause against answering by either *demurrer* or *plea*. As the plea in bar likewise contests the suit, so far as it insists that the cause of action either never existed, or is gone; so, in many cases, where the defendant does not require to protect himself from discovery, or that he must answer as to other particulars, he may insist upon the bar by answer, as effectually as by plea. [a] As pleas and demurrers are used as objections to the being compelled to answer, we shall commence our observations with them, and afterwards treat of the form and general requisites of answers.

## SECTION I.

*Of the General Nature of the Defence by Plea or Demurrer.*

**291.** In a preceding chapter we have pointed out the distinction between pleas and demurrers in equity, and their analogy to the same species of defence at common law; and it there appears that the essential difference between a plea and a demurrer is, that the latter is merely an *issue in law* on the complainant's own showing; the former always puts *matter of fact*, as well as of *law*, in issue. [b] Hence, wherever the objection to answer is founded on a matter of fact not admitted

[a] Mitf. 249. 1 Atk. 54. 2 P. Wms. 145.

[b] *Vide ante*. p. 181-2.

by the bill, and which therefore may be disputed, advantage of such objection must be taken by *plea*, in order that the complainant may have an opportunity to reply, and so take issue upon it. If the objection is apparent on the face of the adverse pleading, and therefore no question of fact can arise, the defendant may *demur*. With the restriction just mentioned; the objections taken, both by *plea* and *demurrer*, are the same; so that in this point of view, the ensuing observations will apply equally to both.

**292.** The student will recollect that we formerly laid down the propositions of a bill to be—1st. That from the relation stated accrues the right to *discovery*, and such *relief* as is prayed for. 2d. That the relation stated is that which actually exists; and that these propositions admit of any defence which either, 1st, denies the right either to discovery, or relief, or both: or 2d, denies the relation; or 3d; invalidates the relation, or bars the right. [a]

**293.** First, as to the denial of the *right*. This is analogous to the first mode of defence at law, mentioned in the chapter before alluded to, which, admitting the facts of the case, denies the inference or the rule of law sought to be established, which, as we have seen, constitutes a demurrer. In like manner, this defence in equity, while it takes the statement in the bill as true, yet insists that the facts, even as stated by the complainant himself, do not give him a right to discovery or to relief.

**294.** In equity there are many cases where, though the court will not assume a jurisdiction to give relief, yet the complainant will be entitled to a discovery in aid of the jurisdiction of other courts. [b] In such cases, however, the bill must be a bill of discovery only; and if it should seek any relief beyond the mere collateral relief of an injunction, or a commission to examine witnesses, [c] and the like, it may be

[a] *Vide ante*, p. 179-80.

[b] *Mittf.* 42, 149. 2 *Ves.* 398.

[c] 1 *Bro. C. C.* 471. 2 *Ves. Jun.* 514.

demurred to. [a] In other instances the court will not interfere even for the purpose of discovery; and if the bill should state a case not entitling the complainant to discovery, it may be demurred to as a bill of discovery merely. [b] But discovery being, as before stated, incidental to relief where the complainant has a right to the assistance of the court, no demurrer will hold to the discovery, [c] unless, indeed, it be to a point which might subject the defendant to penalties or forfeiture, which is a good ground of demurrer: [d] or if he does not think proper to defend himself from the discovery, by demurrer or plea, according to the circumstances of the case, he may by answer insist that he is not obliged to make the discovery. [e]

**295.** Second: The defence in equity, which denies the *relation* assumed, or, in other words, denies the truth of the facts stated in the bill, is analogous to the plea of the general issue stated at common law, and is taken advantage of by way of answer, which puts the complainant on the necessity of proving the allegations denied, if material to support his case. [f] In like manner the same defence, and with a similar analogy to common law, may be made by denying some particular fact on which the whole relation, and consequently the right, is founded. This last is used by plea, the negative averments of which must be supported by answer also, for the reasons assigned in a previous chapter. [g]

**296.** Third: The defence which *invalidates* the relation, or *bars* the right, is similar in all respects to a special plea in bar, at common law. To *invalidate the relation*, therefore, some new matter must be stated, which may show that the

[a] Mitf. 149, and the cases there cited. *Vide* also, 6 Ves. 62. 11 Ves. 509. 2 Ves. & Beames, 328.

[b] Mitf. 150.

[c] *Ibid*, and see Forest's Rep. in Exchequer, 129. 6 Ves. 37-8. 1 Swanst. 294.

[d] 1 Mad. Cha. Prac. 214, and the cases there cited.

[e] Mitf. 163, 219. 3 Bro. C. C. 40. 3 P. Wms. 233. 10 Ves. 450.

[f] *Vide ante*, p. 79.

[g] *Vide ante*, Part II, cap. 1, sec. 3.

*parties* were incapacitated from contracting the relation, or are incapable to continue it; or that the *subject matter* was insufficient or illegal, or had undergone some alteration; or that the *right*, being incidental, had not accrued—as where a condition precedent had not been performed. Again, new matter may be stated to show that the *right*, though once existing, is barred by the *act of the party*, by the *act of law*; or, lastly, by the *act of God*, or unavoidable calamity. In all these cases, as new matter must be put in issue, the defence must be by plea.

297. It is to be observed, that according to the first proposition of the bill stated above, the *right* of which we here speak and which the defence either denies or invalidates, is *the right to discovery and relief*, which may be termed the *general right*, to contra-distinguish it from the *particular rights* flowing from the relation sought to be established, and which are included in the relief required. It is clear that the right to discovery and relief involves the consideration of the mode of *applying for redress*, since, if this latter be defective, the court will not interfere, at least until the defect be remedied. All those objections, therefore, which we have noticed before [a] as the subject of pleas in abatement, and to the jurisdiction, are equally applicable as modes of defence in equity, whether by demurrer or plea. In point of fact, there is this distinction to be taken between those modes of defence as used at common law, and as used in equity: that in the former case, general demurrers and pleas in bar are considered as effective answers to contest the suit; in equity, as has been already stated, pleas and demurrers of all kinds are more in the nature of exceptions to answering or contesting the suit, either because the court has not *jurisdiction*, or the suit has *abated*, or is *defective*, or *barred*. And this difference arises from the double character, as formerly noticed, which is sustained by the answer in equity—it being a pleading so far as it denies, and a proof so far as it admits, the allegations of the bill.

[a] *Ante* Part II, cap. I, sec. I.

**298.** In this point of view, pleas and demurrers correspond precisely with the "*exceptiones*" of the civil law, which were either *declinatoriæ* to the jurisdiction, *dilatoriæ* in abatement, or *peremptoriæ* in bar. [a] These were always argued before the prætor, as reasons why it would be unnecessary to give judges to the parties to contest the suit, since, if the exceptions were allowed, it would be useless for the cause to proceed. The two first were valid reasons why the defendant should not *in jus vocari*; the latter, or *exceptiones peremptoriæ*, though going to the very cause of action, and therefore a fit subject for the judges to decide, yet being a clear objection *in limine*, it saved the parties much expense and delay by having the matter disposed of by the prætor in the first instance; and this, as we have seen, is one of the principal advantages of a plea. We have also seen, that with us, in many instances, the same points that might have been made available as a plea in bar, are allowed to be given in evidence under the general issue, or may be insisted upon by way of answer in equity.

**299.** The method in the civil law was, that if the peremptory exception was clearly proved before the prætor, he proceeded no farther in the cause; but if the peremptory exception was doubtful, either in point of law or matter of fact, then he remitted it to the judges to determine it, since it was then proper that it should be put in judgment. [b] So in equity, upon the argument of a plea, the plea is frequently ordered to stand for an answer, with liberty for the complainant to except; and thus the whole matter is referred to the hearing. [c]

**300.** We have, in a former chapter, observed the close affinity between the method of the Roman law and that adopted by the common law of England, where we have remarked that our trial by jury is, in reality, nothing more than giving judges, after the preliminary pleadings have been decided by the court; and, in many cases, the law is so interwoven with the fact, that the jury are, of necessity, the judges

[a] *Vide* Gilb. For. Rom. 50.

[b] Gilb. For. Rom. 50.

[c] *Vide ante*, p. 38.

of both; and in one case more particularly, that of libel, by express act of parliament. In like manner, in *equity*, the masters in chancery, who were anciently the counsel and assistants to our clerical chancellors, were some of them given as judges; and this is the foundation of the judicial authority of the master of the rolls, who is the head of the masters in chancery, and, as such, entrusted with the keeping of the rolls of the court, whence he derives his name. [a] So, also, at the present day, all matters of account and such like are at once referred to a master, to be decided by him. Anciently, when the cause was remitted to the master of the rolls, he used to examine the witnesses himself; but in course of time that duty devolved upon officers deputed by him, and thence called examiners (b) (for which reason he has the nomination to that appointment to this day); and hence this proceeding in chancery is still a remnant of the practice of *giving judges* to inquire into matters of fact, although the court retains to itself the ultimate decision of the cause upon the proofs and arguments at the hearing.

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## SECTION II.

### *Of the subject matter of Pleas and Demurrers, both to the Discovery and Relief.*

**301.** Having thus made it appear that in equity at least, demurrers and pleas are used for the purpose of showing that the suit ought not to be further contested, it remains now to see what objections will be deemed available to that end. It has been already shown that whatever objection holds against the relief sought by a bill, is equally valid against the discovery prayed by the same bill, the latter being incidental to the former. (c) But as bills are sometimes filed for discovery only, there are some objections which extend to mere discov-

[a] *Vide* Sir Jos. Jekyll's *Treatise on the Judicial Authority of the Master of the Rolls*.

(b) *Ibid*.

(c) *Ante*, p. 162.

ery. We shall, therefore, take each in its turn; and first of the objections to relief.

I. It is material to observe here, that as pleas in equity may be either in abatement or in bar, since the *right* to discovery and relief may be met by objections that go in abatement as well as in bar, so demurrers also, which *deny that right*, may be sustained on either of those grounds. It is different, however, as to answers, because the want of *relation* is an objection in bar, and consequently, the answer, the use of which is to deny, or invalidate the *relation*, is in *bar* only, (a) and cannot insist upon an objection in abatement.

302. The annexed synopsis will exhibit, at one view, all the modes of defence to the relief, which may be used in equity; any of which may be taken advantage of, as preliminary objections, by plea or demurrer, to the defendant's answering or contesting the suit, with the exception of that mode which denies the relation: which, being in reality the very *litis contestatio* itself, must be done by answer, unless where the same thing can be effected by means of the *negative plea*. It was formerly, indeed, matter of doubt how far the negative plea ought to be allowed in equity (b) since it was thought that the answer was the most fitting mode of contesting the character in which the complainant sued, and on which his supposed claim was founded. But it has since been determined, and justly, that the negative plea is good; for otherwise, any person assuming a fictitious character might force a discovery from a defendant, to which, in his real capacity, he would have no right. (c) For it is an invariable rule that when a defendant does not plead or demur, but submits to answer, he must answer fully. (d)

(a) "An answer is that which the defendant pleadeth, or saith in bar, to avoid the plaintiff's bill or action, either by confessing, and avoiding, or traversing and denying, the material parts thereof." West's Symb. 104. Hinde, 196

(b) Beames' Pleas, 123, *et seq.* and Mitf. 187, 188.

(c) Ibid.

(d) *Mazzaredo v. Maitland*, 3 Madd. Rep. 70. And see 11 Ves. 395, and 16 Ves. 382.



**303. II.** We next come to those objections which hold even to discovery, without any relief being prayed; and first, we may lay it down as a general rule, that whatever objections are valid to avoid a discovery, are *a fortiori* good as against relief; or negatively, that where there is no objection to relief, there can be none to discovery, unless where such discovery might subject the party to a penalty or forfeiture. But the converse of this proposition does not hold; for there may be no objection to the discovery and yet an objection to the relief; or, in other words, that which is an objection to a bill for relief, may yet be no objection to a bill of discovery. For as a bill for a mere discovery seeks no decree, so want of equity or want of proper parties would be no objection. (a) But as the discovery in a *bill for relief* is only subsidiary to the relief, if there be a valid objection to the latter, the discovery, though otherwise proper, must fall with it. (b) Care must be taken, therefore, that the bill do not pray relief when the complainant has a right only to discovery. (c) And it appears that even where the answer to a bill of discovery might furnish ground for supposing that relief was in equity, not in law, yet that the bill cannot be amended by adding a prayer for relief, but that it would be better to direct the complainant to pay the costs and bring a new bill; and if in that case any use is to be made of the discovery given by the first answer, to let it be read as an answer to a bill of discovery, as evidence, not as part of the defence, or admission, upon which the bill proceeds. (d)

**304.** A bill of mere discovery is always brought in support or defence of a civil suit, either in the court itself or in some other court. In this respect, therefore, the court of

(a) Mitf. 163.

(b) Mitf. 149. Beames' Pleas, 250, and the cases there cited. See also 3 Meriv. 175. 1 Ves. & Beames, 539.

(c) But a mere prayer for *general* relief, or for the *collateral* relief of an injunction, commission, and the like, will not render a bill of discovery demurrable. *Vide* 2 Ves. jun. 514; *et ante*, p. 237.

(d) See the observations of Lord Eldon, in *Butterworth v. Bailey* 15 Ves. 358.

equity assumes a jurisdiction to compel discovery, even where it has not authority to extend relief. Consequently, the want of equity will be no good ground to avoid an answer. But if a mere discovery be sought, where the court has not even jurisdiction to that extent—as if the discovery be sought in aid of a court of criminal jurisprudence, (a) or of a court which has itself authority to compel the discovery, (b) the defendant may plead or demur *to the jurisdiction*.

**305.** All pleas *to the person* extend to the discovery, as well as to relief; for they are objections to show that the complainant cannot institute a suit in any court. But, on the other hand, no plea in abatement, on the ground of the *mode of proceeding being defective*, can be used as an objection to a bill of discovery; because such a bill seeks no *decree* from the court. Multifariousness ought, perhaps, to be made an exception, (c) that the defendant may not be uselessly harrassed.

**306.** Next, as to the objections *in bar*. As the discovery is only for the purpose of obtaining relief, either in the same or in another court of justice, any objection which shows that the complainant can have no right to relief, either *in the same or any other court*, will bar his right to discovery. All the objections *in bar* for relief, therefore, in equity, will be equally valid against discovery in aid of relief *there*. (d) Yet there is one seeming exception to this rule, namely, as to the objection which *denies that the defendant has such an interest as can make him liable*; for persons, not otherwise interested, are frequently made parties for the mere purpose of discovery; such as the officers of the corporation (which, as it answers under seal, cannot be indicted for perjury) or attorneys, auctioneers, agents and arbitrators, when charged with being parties to a fraud. (e) But further, if the complainant has no

(a) 2 Ves. 398.

(b) 1 Atk. 288. 1 Ves. 205. 2 Ves. 451.

(c) Mitf. 163.

(d) 2 Ves. 71. 3 Meriv. 175. 1 Ves. & Beames, 539. And see Lord Alvanley's observations, in 3 Ves. 247.

(e) *Vide* Beames' Pleas, 132, and the cases there cited.

right of action *in any other court*, he can have no title to discovery in *this*; and the want of such right may be pleaded in bar, or objected by demurrer. (a) And even though the complainant should have such right, yet if the defendant has an equal claim to protection—as where he is a *purchaser for valuable consideration, without notice*, the court will not interpose, even to compel a *discovery*. This last plea, therefore, is equally a bar to discovery, in aid of the jurisdiction of other courts, as it is to relief, and consequently to discovery, in this. (b)

**307.** There are yet some objections peculiar to discovery, as regarded in the light of an examination. Thus, a defendant may refuse to answer any question that would subject him to a penalty or forfeiture, (c) unless such forfeiture be waived by the person competent to do so, (d) or that would cause a breach of the confidence reposed in him, as counsel, attorney, or arbitrator. (e) And this arises from the peculiar nature of a bill, which is both a pleading and an examination. The objections on such grounds may be taken to the bill, in its character of a pleading, by plea or demurrer; but as it is also on examination, the defendant may, without demurring or pleading, decline answering to the objectionable parts. (f) And this is the only exception to the general rule that when a defendant submits to answer, and neither pleads nor demurs, he must answer fully. (g) For reasons grounded on similar principles, if the discovery sought be *immaterial* to the relief required, either in the same or another court, the bill, which seeks such discovery, may be demurred to; or matter may be pleaded to show that the discovery, when obtained, would be immaterial. (h)

(a) Mitf. 152. 3 Bro. C. C. 154. 3 Ves. jun. 491. 13 Ves. 240.

(b) 2 Cha. Ca. 72. 1 Vern. 27. 1 Ventr. 198. 2 Ves. jun. 454.

(c) 1 Bro. C. C. 98. 1 Atk. 529. 2 Ves. 389. 2 Atk. 392.

(d) 1 Vern. 109, 129, 306. 1 Chan. Rep. 141. 2 Atk. 393.

(e) Cha. Ca. 277. Finch. Rep. 62.

(f) Mitf. 163, 249. 3 Bro. C. C. 40. 3 P. Wms. 238. 10 Ves. 450.

(g) 3 Madd. Rep. 70.

(h) Mitf. 155, 156. 1 Bro. C. C. 98. 2 Atk. 387, 394. 2 Ves. jun. 336.

## SECTION III.

*Of the Defence to Bills not Original.*

**308.** The objections which are peculiar to the bills not original, are chiefly in the nature of objections to the form of proceeding—as where a devisee files a bill of revivor, (a) when, as we have before seen, his proper course would be by original bill, in the nature of a bill of revivor; or where a complainant states, by way of supplemental bill, facts which might have been added by amendment; (b) or amends his original bill by adding new facts which had occurred since the institution of the suit, and which therefore are the subject of supplemental matter only. (c)

**309.** So, in like manner, if a person not a party or privy to the original suit brings a bill of review, the defendant may demur; or if such bill be brought against a defendant not a party to the original bill. (d) But any matter which shows that the right, though existing at the time when the original bill was filed, had been subsequently barred—as by release, fine, and non-claim, (e) statute of limitations, (f) or decree enrolled twenty years—(g) may be pleaded against the secondary bills. Wherever new matter is introduced, either by supplement or in a bill of review, such new matter is liable to any objection which might be made to it, if stated in the original bill. (h)

**310.** The proper defence to a bill of revivor is by plea or demurrer, because if the party makes the same objection by answer, it cannot be determined till the hearing. Nevertheless, if at the hearing it does not appear that the complainant

(a) 1 Cha. Ca. 174.

(b) 3 Atk. 817. 2 Mad. Rep. 240.

(c) 1 Atk. 291.

(d) Gilb. For. Rom. 186. 1 Chan. Ca. 123.

(e) 2 Vern. 190.

(f) 1 P. Wms. 742.

(g) 5 Brown. P. C. 466. 6 Brown. P. C. 395. 1 Vern. 287. 1 Ves. & Beames, 536.

(h) Mitf. 226.

Eq. PL.—19.

had a title to revive, although the defendant did not take advantage of the objection in any manner, he shall gain nothing by his bill. (a)

**311.** The regular defence to a bill of review for *error apparent*, is to plead the decree in bar to the new suit, and demur to opening the enrolment, (b) on the ground that the errors assigned are not such as to entitle the complainant to have the decree *reviewed*, much less *reversed*. The first question therefore, is, whether the enrolment should be opened, and the decree *reviewed*, and this is argued upon the demurrer, when nothing can be read but what appears upon the face of the decree; if the demurrer be overruled, then arises the second question, whether the decree ought to be *reversed*; and the complainant is at liberty to read bill and answer, or any other evidence, as at a rehearing, the cause being equally open. (c)

**312.** The plea of the decree is proper in this case, and because it is the very foundation of the defence which is proveable by the record; and although it appears on the face of the bill, yet it is there sought to be impeached on the ground of error apparent, which error being a question of *law* only, is rightly denied by demurrer; as likewise in a similar manner, when a bill is brought to set aside a decree on the ground of fraud, the decree itself is pleaded in bar, and the fraud, which is a question of *fact*, is denied by answer, in support of the plea, as well as by negative averments in the plea. (d)

**313.** Where a bill of review is brought on *discovery of new matter*, a case can scarcely occur where it will be necessary to plead or demur, as the leave of the court must be had before the bill is filed. The fact of the discovery, however, may be contradicted by plea, or traversed by answer; and, in general, the new matter is liable to any objection which would have been good ground of defence to it in the original bill. (e)

(a) 3 P. Wms. 348; and see *ante*, Part. I., cap. 16.

(b) 1 Vern. 392. 2 Atk. 534.

(c) 1 Atk. 290.

(d) See *ante*, p. 184.

(e) Mitf. 238.

**314.** A demurrer for want of equity will not hold to a cross bill, for the defendant being drawn into court by the complainant in the original bill, he may avail himself of the assistance of the court, without being obliged to show a ground of equity to support its jurisdiction. (a) For the same reason, such bills are not liable to any objections to the person, except the informality of the bill being exhibited in the name of a person who is incapable of instituting a suit alone. (b)

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#### SECTION IV.

##### *Of the general Form and Structure of Pleas and Demurrers.*

**315.** Our next consideration will be, as to the form and general requisites of pleas and demurrers. The defendant being called upon by the *subpœna* to answer the interrogatories in the bill, must do so or show good cause to the contrary; the office of pleas and demurrers is to state such cause. Hence the substance of all pleas and demurrers is, in effect, nothing more than the statement, with certainty and precision, of some of those objections which are to be found in the synopsis of the modes of defence, "wherefore the defendant demands the judgment of the court, whether he shall be compelled to answer and contest the suit; and prays to be dismissed, with his reasonable costs."

**316.** Thus the demurrer contends that the case made by the bill (*admitting it for the sake of argument to be correct*), (c) is yet not such as to entitle the complainant to an answer, (d) either *because* the case, as stated, does not contain some essential ingredient necessary to establish the right, or *because* some fact is therein stated which operates as an avoidance to the right. (e) Again, the plea admits, *for the sake of argu-*

(a) Hard. 160. 3 Atk. 812.

(b) Hinde, 190.

(c) 2 Ves. Jun. 95.

(d) 3 Meriv. 503.

(e) 3 Ves. 255.

ment, that the facts stated in the bill are true, (a) and that the legal inference drawn is correct; but it avers that there are other circumstances connected with the case which displace the equity, (b) or which, in other words, by changing the nature of the relation between the parties, avoid the right established by the bill. The negative plea differs only in this, that instead of averring new facts, it denies some one essential position of the bill, admitting, *for the sake of argument*, that all the rest of the facts relied upon are true.

**317.** From this view it is apparent that the essential part of a plea or demurrer is the assignment of the reasons on which the defendant relies for not answering; and this is the substance and *body* of the pleading, which consists of the enumeration of the causes of *demurrer*, or the averment of the facts which constitute the *plea*. There are, besides, a formal commencement and conclusion, each of which performs distinct functions, and therefore the pleading may, with sufficient convenience, be divided into three parts: first, the commencement; second, the body; and, third, the conclusion. We shall here subjoin the skeleton form of a demurrer, and of a plea, and then add some remarks upon each part in its order.

**318.** The Demurrer of C. D., Defendant, to the Bill of Complaint of A. B., Complainant.

[A] This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true, in such manner and form as the same are therein set forth, doth demur thereto; [B] and for cause of demurrer sheweth, that [the said complainant hath not by his own showing made out a case which establishes his right, title, or interest; or that he hath admitted and acknowledged, by his said bill, certain facts which, by the known rules of the law, avoid his right to an answer.] [C] Wherefore, and for divers other defects and causes of

(a) 2 Atk. 51.

(b) 1 Bro C. C. 417. 1 Atk. 54. 3 Atk. 341. 15 Ves. 376.

demurrer appearing in the said complainant's said bill, this defendant doth demur thereto, and humbly demands the judgment of this honorable court whether he shall be compelled to make any answer to the said bill; and prays to be hence dismissed, with his reasonable costs in this behalf most wrongfully sustained.

The Plea of C, D., Defendant, to the Bill of Complaint  
A. B., Complainant.

[A] This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained, to be true, in such manner and form as the same are therein set forth, doth plead to the said bill; [B] and for plea saith, that [there are certain incidents affecting the relation between the parties, omitted (*or sought to be invalidated*) in the said bill, but which, when stated (*or discharged from impeachment*), show that this defendant ought not be compelled to answer the said bill]; and this defendant avers [all necessary circumstances to avoid ambiguity and exclude unfavorable construction.] [C] All which matters and things this defendant doth aver to be true; and therefore he doth plead the same to the said bill as aforesaid, and humbly demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed, with his reasonable costs in this behalf most wrongfully sustained.

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## SECTION V.

### *Of the Commencement.*

319. (1) As to the commencement: We see that both pleas and demurrers begin with a protestation against confessing the facts, as stated in the bill, to be true. This is a form frequently used at common law, when the party pleading wishes to avoid the inference that he admits anything which he has not an opportunity of putting in issue in that cause;



and Lord Coke therefore defines it to be “the exclusion of a conclusion.” [a] The use of the protestation of the commencement of the plea and demurrer in equity is to save the defendant from being concluded by his implied admission of the truth of the facts stated in the bill, and is a kind of declaration *in limine* that such facts are only admitted *for the sake of the argument*; for if subsequently his plea or demurrer should be overruled on argument, he is then to make a new defence, and may by answer deny or explain away the statement, which the plea or demurrer had by implication allowed. [b]

**320.** A *protestando* to the same effect is not necessary at common law, because there the plea in bar or demurrer, being an effective *litis contestatio*, is conclusive either way; and the plea in abatement (on which, being overruled, the judgment is *respondent auster*) [c] does not bring into question the merits of the case, and, consequently, neither admits nor denies the facts stated in the declaration. But, as we have already seen, in equity, pleas and demurrers are more in the nature of objections to answer, and proceed upon the ground that, *even granting that the complainant's statement be true*, still there is some reason, either *apparent* or *stated*, in the plea, why he has not the right to discovery, or to the relief as prayed. [d]

**321.** If the demurrer or plea be allowed, therefore, it is in effect the decision of the court, that the complainant has no right to discovery or relief, and consequently the bill is dismissed. (e) In case however it be not a dismissal on the merits, such dismissal will not preclude the complainant from bringing a new bill, when the disability is removed, or informality rectified; (f) and if this latter can be effected by

[a] Co. Litt. 124, b.

[b] Mitf. 14.

[c] 2 Saund 211. a. n. [3]

[d] *Ante*. p. 235, 239.

(e) 3 P. Wms. 95. Mitf. 175.

(f) *Ibid*.

amendment, the court might make a special order to that effect, without dismissing the bill. (a) On the other hand, with respect to a plea, though the opinion of the court on argument should be favorable to the defendant, this does not terminate the proceedings; for, though the reasoning in law may be correct, the facts on which the rule of law is founded, may be untrue; to put which in issue, the complainant may reply, even after the plea has been allowed; (b) and if at the hearing it shall appear that the defendant has not proved his case, the plea is of no avail, and the defendant must answer interrogatories to supply the place of that discovery to which the complainant, but for the plea, would have been entitled by answer. (c)

**322.** From the complex nature of a bill in equity, it is obvious that the same defence may not be applicable to every part, but that it may be expedient to demur, or plead to one part of the bill, and answer to the rest; or to demur, plead, and answer to different parts; and sometimes it may be necessary to have separate demurrers or separate pleas to distinct portions of the bill. Whenever, therefore, the demurrer or plea does not extend to the whole bill, it should clearly express what part of the bill it is intended to cover, and what it is the party refuses to answer, (d) otherwise the court would be put to great difficulty, and be obliged to refer to the bill and answer, to ascertain how far the pleading was meant to go; as, on the other hand, in case of a reference of the answer to a master, upon exceptions, he would be at a loss to determine, precisely, whether the answer was sufficient or not. (e) And it would not be enough, in such case, to say that the defendant answers to such and such facts, and pleads or demurs to all the rest of the bill; for a pleading of this sort would be overruled for being too general. (f) It is in the commence-

(a) Mitf. 13, n. (p) 175.

(b) Mitf. 244. Beames' Pleas. 317.

(c) 2 Ves. 247.

(d) 2 Ves. 108, 450.

(e) 2 Sch. & Lefr. 207.

(f) Ibid. and vide 3 Atk. 70. Mos. 40. 1 Ves. & Beames, 514.

ment of the plea or demurrer, immediately after the protestation, that the statement is introduced of what part of the bill is sought to be covered by the pleading. The commencement in such case runs thus: "This defendant, by protestation, etc., doth demur (*or plead*) to so much and such part of the said bill as prays, etc., (*or seeks a discovery from the defendant, whether, etc.*")

**323.** Great care, however, must be taken not to make the *demurrer* extend to any part of the bill to which it will not be a good defence; for a *demurrer cannot be good in part, and bad in part*; (*a*) that is, if there be any part of the bill sought to be covered by the demurrer, to which the demurrer does not extend, the whole demurrer must be overruled; (*b*) because the court will not be at the trouble of examining to which part of the bill the demurrer is applicable; yet the defendant is not thereby debarred of his defence, because he may afterwards, with the leave of the court, file a new demurrer of less extent. (*c*) But if a defendant has demurred to part only of a bill, and answered other parts, it is no objection to the allowance of the demurrer that it is equally applicable to the whole of the bill. (*d*) So, where there are separate demurrers to distinct parts of the bill, one demurrer may be overruled upon argument and another allowed. (*e*)

**324.** But with respect to pleas, the rule is different; for a *plea may be good in part and bad in part*; (*f*) or, in other words, if the plea cover too much, it will nevertheless be allowed to the extent to which it is applicable, (*g*) and the reason that the rule with regard to demurrers does not extend to pleas, is that the latter, being *special answers* to the bill, as we have seen by the definition formerly quoted, (*h*) it may con-

(*a*) 1 Atk. 451. 2 Atk. 388. 5 Ves. 173.

(*b*) 17 Ves. 280. 1 Swanst. 304.

(*c*) Mitf. 14. 11 Ves. 68.

(*d*) 1 Cox, 416.

(*e*) Mitf. 174. 3 P. Wms. 158. 1 Atk. 544.

(*f*) 4 Bro. C. C. 254. 8 Ves. 403. 11 Ves. 70.

(*g*) Mitf. 240. 2 Atk. 284.

(*h*) *Ante*, p. 186.

veniently enough be ascertained to what part of the bill the plea is an answer, and whether any other part requires a further defence. Indeed, the usual course in such case is to allow the plea to stand for an answer, with liberty to except. (a)

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## SECTION VI.

### *Of the Body, and herein of Averments and Intendments.*

**325.** II. The body of the pleading consists of the assignment of the various causes of demurrer, or the statement of those facts which constitute the plea. A demurrer is the negation of the rule of law laid down in the first proposition of the bill, namely, that the right to discovery and relief results from the relation assumed; or rather, since the causes of demurrer must be assigned, (b) it is a negative proposition that *from the complainant's own showing*, he has not the right to discovery and relief, either *because* the relation stated by him is not adequate, or *because* there are some of the objections to answering which are classified in the *Synopsis*, apparent on the face of the bill. Thus, an issue in law is joined, not in the first instance on the complainant's right, but on the validity of the causes assigned; and if any of these causes be allowed on argument, the right is necessarily gone.

**326.** The statement of the causes of demurrer, therefore, will be nothing more than a reference to the bill, and an enumeration of the objections appearing on the face of it, on which the defendant means to rely. Hence arise two questions: whether the objection, as stated, really exists; and whether such objection is valid. The first is, generally, a question of the adequateness of the relation stated by the bill; the latter is a question on the rule of law; and the defendant should, in assigning the causes of demurrer, clearly point out the nature of the objection which he takes, and how it appears on the adverse pleading.

(a) 6 Ves. 580.

(b) Beames' Ord. Chan. 77, 173.

**327.** It is a general rule, that a *speaking demurrer* is bad; i. e. when it contains argument in the body of it; if, for instance, the demurrer say, "in or about the year 1770, *which is upwards of twenty years before the bill filed.*" (a) A demurrer, also, to anything but what appears on the face of the bill, is considered as a *speaking demurrer*. (b)

**328.** The defendant may show as many causes of demurrer as there are objections apparent in the bill, (c) in which respect a demurrer differs from a plea, which must not (at least without the leave of the court) be *double*; (d) and the reason of this difference is, that one of the principal advantages of a plea being to save the parties the expense of going into an examination at large, that end would be frustrated by permitting the defendant to put in issue a variety of facts constituting distinct bars, any of which would have been sufficient; but demurrers put no facts in issue, and may therefore take every available exception which can be used on the argument; and even causes of demurrer may be stated *ore tenus*, although not set out in the pleading; (e) but nevertheless, only to the extent of the demurrer on the record. (f) For example: if the demurrer be to the discovery, the defendant cannot *ore tenus* demur to the examination of witnesses *de bene esse*: and much less shall he be allowed to demur at the bar, when he has only pleaded, and there is no demurrer in court. (g)

**329.** As a demurrer collects the negative rule of law from the complainant's own statement, so the plea, on the other hand, deduces the same conclusion from a new statement by the defendant. The *body of the plea*, therefore, will consist of a statement of the facts from which the conclusion in objection

(a) 2 Ves. jun. 83.

(b) 2 Ves. 245.

(c) 3 Mad. Rep. 8.

(d) 2 Eq. Abr. 176. 1 Atk. 54. 1 Bro. C. C. 404, and 2 Ves. & Beames, 153, 155.

(e) 1 Vern. 78. 3 P. Wms. 370.

(f) 17 Ves. 212.

(g) 1 Vern. 78.

to answering is drawn, (a) and the defendant, in effect, makes out a collateral case, founded on some one of the modes of defence stated in the *Synopsis*.

**330.** The *collateral case* made by plea, may, like the statement of a bill, be resolved into two propositions, of which one states the rule of law, viz.: 1st, *That certain incidents affecting the relation, avoid the complainant's right to discovery or relief*; the other avers the facts. 2d, *That such incidents are attached to the relation in question*. Hence arise two questions: the first a question of law, as to the validity of the objection relied on; the other a question of fact, as to the truth of those allegations which constitute the objection. Upon either or both of these the complainant may take issue; and we have seen that if the plea on argument be determined against him, he may reply to the question of fact, and put the defendant on the proof; (b) but if he replies in the first instance, without setting down the plea for argument, he thereby admits the validity of the rule of law, which is always the prior question; and he will not afterwards be admitted to dispute it, since he was contented to rest his case on the truth or falsehood of the facts alleged by the plea. (c)

**331.** The statement of the facts then must be direct and positive, and such as will amount to a complete equitable bar or other objection to answering. (d) It must also be clear and precise, and contain such subsidiary *averments* as are necessary to avoid all ambiguity of meaning; for the rule of construction is always unfavorable to the pleader. "*Ambiguum, placitum interpretari debet contra proferentem.*" (e) Hence, *averments* have been divided into *general* and *particular*. (f) The first are those which state generally the collateral case; the latter are such as are used in explanation of the *general*

(a) 3 Atk. 558.

(b) *Ante*, p. 254.

(c) 3 P. Wms. 95.

(d) Mitf. 240. 2 Ves. 245. 3 Atk. 586.

(e) Co. Litt. 303 b.

(f) Co. Litt. 362 b.

*averments* to exclude *intendments* (a) (as they are technically called), which in all cases are taken most strongly against the pleader. The meaning of an *intendment* is, that allowing an averment to be true, but that at the same time a case may be supposed consistent with it, which would render the averment inoperative as a full defence, such case shall be presumed, unless specifically excluded by particular averment—as where a proposition in the disjunctive is not denied in both its parts; or a proposition in the conjunctive, affirmed in both its parts.

**332.** The *general averments* must contain a detailed statement, in their natural order, of all those circumstances, which, taken together, amount to a valid equitable defence; (b) and if any of the links in the chain of facts be wanting, it will be intended against the defendant. It must be a statement of particular *facts*, and not of general deductions from facts; (c) thus, it is not enough to say, that a thing was *duly* or *lawfully* done or executed, without setting out the particular manner; for that is a question for the court to determine, and not for the defendant to assume. This is meant, however, with regard to such averments only as go to the very substance and gist of the bar. To take a peculiar example: the bankruptcy of the plaintiff subsequent to the cause of action, is a good plea in bar, both in law and in equity. (d) It is not, however, his being declared a bankrupt under the commission, which constitutes the bar, but his having *bona fide* committed an act of bankruptcy, and the proceedings thereon, including the transfer of his property to the assignees. For the substance of the bar, in this case, is the want of interest in the plaintiff, such interest being vested in the assignees; but if any of the previous steps be irregular, the assignment is void. It is not sufficient, therefore, to state that the plaintiff was *duly* found and declared a bankrupt under the commission; but his being a trader under the act, his act of bankruptcy and the several

(a) Mitf. 240.

(b) 2 Ves. 243. 1 Bro. C. C. 578.

(c) 4 Bro. C. C. 321. 13 Ves. 29. 2 Sch. & Lefr. 305-6.

(d) 9 Ves. 77. 1 Anstr. 101.

proceedings thereon *seriatim*, must be set out at full length; for although the commissioners may have declared him a bankrupt *non constat*, but that their decision may be reversed, and that is for the court and jury to determine. [a] So also, in pleading a release, the consideration must be set out, [b] or otherwise it will be intended to have been made without a sufficient consideration; for the statement in the bill being taken for true, the demand is acknowledged to be just; and then a release would not be a good bar, unless the consideration were equivalent; [c] but that is for the court to decide.

**333.** If any one of the *general averments* admits of an intendment unfavorable to the defendant, such intendment must be excluded by a *particular* averment. Thus in outlawry or excommunication, which are pleaded *sub pede sigilli*, [d] it must be averred that they are still in force, and also that the person named in the record produced to the court under seal, and the complainant, are one and the same person. This is similar to the usual averment of "*quæ est eadem*," in trespass at common law. In like manner, where the plea has been anticipated and impeached by a charge in the bill, the charge must be negatived by a particular averment [e] to avoid the general intendment that the allegations of the bill are true, and consequently the matter of the plea invalidated. [f]

**334.** But, as we have explained in a former chapter, [g] a plea of this nature must be *supported* by an answer, so far as to deny the matter of impeachment charged in the bill, [h] both for the technical reasons which have been formerly detailed, and for another reason which we shall mention here,

[a] *Vide* what is said by Lord Eldon, in *Carleton v. Leighton*, 3 Meriv. 667.

[b] Hard. 168. 2 Ves. 107. Gilb. For. Rom. 57.

[c] See Lord Redesdale judgment in *Roche v. Morgell*, 2 Sch. & Lefr. 728.

[d] Beames' Ord. Chan. 27.

[e] Mitf. 241, 196, *et seq.*

[f] Mitf. 241, Gilb. For. Rom. 58. 2 Atk. 124.

[g] *Ante*, Part 2, cap. 1, sec. 3.

[h] Mitf. 196, and the cases cited in the note.



namely: that notwithstanding the plea, the complainant is entitled to discovery, so far as relates to the charge, with all its circumstantial interrogations; [a] and it is in its character of a proof, and not as a pleading, that the answer is used in this case. This is the meaning of the position most correctly laid down by Lord Redesdale, when, in combating the notion that there is something incongruous in this mode of pleading, he says, that "the answer is no part of the defence." [b] The plea alone is the defence; the answer is but the discovery to which the complainant is entitled, and which the plea cannot cover, because the validity of the plea depends in a great measure on the discovery, to which alone the complainant can except; and the negative averment in the plea "does not require positive assertion." [c] Answers are thus used sometimes in *support* of a plea; but in other respects, if a defendant were to answer to parts of the bill, covered by plea or demurrer—these pleadings being in fact, only objections to answering—would be thereby waived. [d]

**335.** From the strictness of the rules regarding pleas, it is apparent that in order to make the plea a full defence, all the averments must be stated positively; [e] although in some instances—as in case of negative averments, and of averment of facts not within the immediate knowledge of the defendant, he will be permitted to aver according to the best of his knowledge and belief. [f] A variety of facts may be averred, provided they all tend to the same conclusion, and amount to a *single* objection; [g] for, if more than one objection were taken, the plea would be bad for duplicity. [h] By the common law, a double plea, or one which assigned more than one cause

[a] Gilb. For. Rom. 58. Mitf. 200. 6 Ves. 592.

[b] *Vide* Mitf. 199, note [h] and *vide* Beames' Pleas, 34.

[c] Mitf. 240.

[d] Gilb. For. Rom. 58. 2 Atk. 155. 1 Anstr. 14. 1 Vern. 90.

[e] 3 Atk. 586.

[f] Mitf. 240.

[g] 1 P. Wms. 723. 15 Ves. 79.

[h] 2 Eq. Ca. Abr. 176. 1 Atk. 54. 1 Bro. C. C. 404. 2 Ves. & Beames'

in bar of a suit, was bad; [a] but now, by stat. 4th Ann c. 16, two several bars may be pleaded by the leave of the court, in any court of record. The court of equity not being a court of record, it was considered that a double plea in this court would be fatal; but it has lately been decided that with the leave of the court, the defendant may plead double; [b] and justly, since it would be contrary to all analogy, that the same latitude should not be allowed in equity as at common law; and the previous sanction of the court sufficiently guards against abuse.

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## SECTION VII.

### *Of the Conclusion.*

**336. III.** The conclusion of a plea or demurrer is, substantially an appeal to the court, whether the defendant, for the reason assigned in the body of the pleading, ought to be compelled to put in an answer and contest the suit, or make that discovery which the complainant seeks by his bill; and it ends with a prayer that the party may be dismissed from attendance, with his reasonable costs. The purport and design of pleas and demurrers of all descriptions in equity being to avoid an answer, [c] the same conclusion is alike applicable to every species. In general, however, in pleas in bar, the defendant states that he avers the matter contained in his plea, and pleads the same *in bar*; [d] but this, though usual, is not necessary, nor will the want of it vitiate the plea. [e]

**337.** At common law, every plea has its apt and proper conclusion, [f] by which the nature of the plea is to be judged;

[a] Co. Litt. 304, a.

[b] Gibson v. Whitehead. 30th July, 1819, before V. C. Leach, cited in Madd. Chan. Prac. 299.

[c] Gilb. For. Rom. 53.

[d] Beames' Pleas, 49.

[e] This point was raised in the case of Merewether v. Mellish, 13 Ves. 435; but it was not even noticed by the court.

[f] Co. Litt. 303 b.

and therefore an improper conclusion would be fatal, there being an essential difference as to the judgment to be pronounced on each. [a] The slightest informality will invalidate the plea in abatement; [b] because the courts discountenance these pleas, which do not go to the merits; and it is but reasonable that he that objects upon mere form, shall be judged by the same rule; besides, the judgment in such case is only interlocutory, *quod respondeat ouster*. [c] In equity, the decision of the court with respect to all kinds of pleas and demurrers is the same, viz: the bill is dismissed, or the defendant is put to *answer over*, and contest the suit. In this regard, all pleas, even such as are in bar in equity, are analogous to pleas in abatement at common law, which do not contest the suit. In equity, the answer is the only pleading which effectively contests the suit; and all pleas, whether dilatory or peremptory, are only objections to answering. Hence has arisen the doubt, whether there be any pleas in abatement in equity, as contra-distinguished from pleas in bar; [d] and certainly it would be more correct to divide pleas in equity into declinatory, dilatory and peremptory, in analogy to the civil law, from which the proceedings in this court are derived. The judgment, in all pleas in equity, being the same, the conclusion need not be different; and, as we have seen, they bear an analogy to pleas in abatement at common law; so the conclusion is similar to that of pleas to the person at common law, where the defendant demands the judgment of the court *si respondere debet*. [e] Thus, too, and with the same analogy, pleas of matter *in pais*, like pleas in abatement at common law, [f] must be put in upon oath.

**338.** It has been questioned whether a plea in equity, which did not conclude by averring the facts to be true, [g]

[a] 1 Saund. 103, a. n. [1.]

[b] 3 Term. Rep. 185. 8 Term. Rep. 515.

[c] 2 Saund. 211, a. n. [3.]

[d] *Vide* Beames' Pleas, 57, *et seq.*

[e] 2 Saund. 210, note. Tidd, 576.

[f] 2 Str. 705, 738.

[g] *Randolph v. Randolph*, Hardr. 160.

similar to the "*hoc paratus est verificare*," at common law, would be good; but since the stat. 4 Ann, c. 16, not even at common law can this objection [a] (nor the omission of "*prout patet per recordum*"), be taken advantage of, but by special demurrer, and it would not, it is concluded, be available in equity.

**339.** When the plea or demurrer extends to part only of the bill, the conclusion must be conformable thereto; and as in that case there must be an answer to the rest of the bill, not covered by the plea or demurrer, such answer is preceded by a protestation against a waiver of the plea. So, likewise, when the answer is in support of the plea, it is expressed to be made for that purpose, and preceded by a similar protestation. This is, however, *ex abundanti cautela*, because an answer is only a waiver to the plea, "when it puts in issue anything which the plea would cover from being put in issue." [b] Where an answer is added to a plea or demurrer, the prayer to be dismissed with costs is inserted at the end of the answer. In cases of this nature the conclusion runs thus: "This defendant doth plead (*or demur*) to so much of the said bill as is hereinbefore mentioned, and humbly demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to so much of the said bill as is hereinbefore pleaded (*or demurred*) to. And this defendant, not waiving his said plea (*or demurrer*), but relying thereon for answer to the residue of the said bill, saith," etc. If the answer be in support of the plea, "this defendant not waiving his said plea, but relying thereon, and for better supporting the same, for answer to so much of the said bill as aforesaid, saith," etc. The nature and form of answers will be the subject of our consideration in the ensuing chapter.

[a] 1 East, 369.

[b] Gilb For. Rom. 58. Mitf. 195, n. [c]

## CHAPTER V.

## Answers.

**340.** If the defendant cannot protect himself from discovery, by either plea or demurrer, he must give a distinct and full answer to each particular allegation and charge in the bill. The bill calls on the defendant "to make full, true, perfect and distinct answers to all and singular the matters therein contained; and that as fully and particularly as if they were repeated by way of interrogation;" and it then proceeds to interrogate to each point circumstantially. The defendant must therefore answer every part of the substance of the statement and charges, even though it should be omitted in the interrogation; and further, as the use of the interrogating part in the bill is to extract a full confession and prevent evasion or ambiguity, every particular question must be answered precisely in all its bearings and circumstances, provided it be founded upon some express allegation in the body of the bill. [a] So far as the answer is an admission of the facts charged by the complainant, it stands in place of proof in the cause; and hence the great object which the complainant has in view, is to obtain such an answer as will either *supply* proof, where the facts rest within the knowledge of the defendant, and are binding in conscience only, or such as will *aid* proof, viz: where, although he shall be able to prove the facts by the testimony of others, yet the defendant's admissions will save him the trouble and expense of examining witnesses to those points which are acknowledged by the answer. [b] Looked upon in this point of view, therefore, the answer must fully and fairly meet every inquiry in the bill, for if there be any possibility of evasion, the complainant will except. For this reason, the primary consideration with the draftsman is to

[a] 1 Bro. C. C. 503. 6 Ves. 37-8.

[b] 2 Atk. 241. 2 Ves. 492.

make the answer *sufficient*, and most of the observations we shall have to make on the subject of answers will relate to this point.

**341.** In earlier times, the forms of proceeding in this court do not appear to have been near so strict as they are at the present day, although perhaps they were abundantly sufficient for all purposes at that period when the authority of the court of chancery was yet in its infancy; and this looseness of form was certainly more conformable to the notion of equity then entertained, being considered as a relaxation of the rule of law. Thus the answer seems to have been little more than a general and informal statement of the adverse case, in reply to the bill, accompanied with a traverse of all such points as the defendant thought it material to deny, in order to put the complainant upon the proof, and concluding with a general traverse of whatever was not admitted to be true. This general traverse at the end of the answer, though now unnecessary, as every point must be answered separately, is still continued in practice. [a] In like manner, the defendant was permitted to answer and plead, or demur, at the same time, and to the same parts of the bill; because the answer, being such as we have described it above, was not considered so much in the light of a discovery, which the defendant by his plea or demurrer would avoid, as of a pleading to be used only on the defence. Hence it was usual to commence the answer with a general reservation of the right to except to the complainant's bill; and although, since the practice of the court has been matured, the answer would be a waiver of a plea or demurrer, [b] and consequently no objection can be taken after answer to the bill, [c] still the old form of commencement is adhered to. The commencement is now, therefore, a mere technical form, of no further utility than as it serves to characterize the pleading. In the case of an infant,

[a] 2 P. Wms. 87.

[b] Mitf. 256. 3 Anst. 715. 2 Atk. 155.

[c] But if, after an answer, the complainant amends his bill, the defendant may, notwithstanding his former answer, put in a plea to the amended bill. *Vide Ritchie v. Aylwin*, 15 Ves. 79.

whose rights and interests are under the peculiar protection of the court, this form of reserving the benefit of exceptions, as well as the usual denial of combination, at the close of the answer, are omitted. [a]

**342.** The defendant, by his oath, is bound to answer according to the best and utmost of his knowledge, remembrance, information and belief. That which he is acquainted with of his own knowledge admits of a direct answer, either in the affirmative or negative, unless it be a matter of recollection, in which respect the answer must be qualified according to the extent of the remembrance. Such circumstances as are known to the defendant from information and hearsay only, are the proper subjects of belief, and on which he in general has formed some opinion, either of assent or dissent. It is not enough, therefore, to answer the question by saying he has been informed, or heard of any particular fact, but he must state whether or not he believes it to be true. [b] Again, there may be other facts alleged in the bill, to which the defendant is a total stranger, and of the truth of which he cannot form any opinion. Thus, the answer will be either a direct admission or denial, or an assent or dissent, or a declaration that the defendant cannot, as to his belief or otherwise, form any opinion of the truth or falsehood of the facts alleged.

**343.** But there may be statements or charges in the bill, which though true in part, are yet substantially incorrect, and which, therefore, it may be necessary to add to, qualify, or explain. To questions of this nature the defendant cannot give a direct answer in the first instance; but he must state the case according to the fact, and conclude by denying that the particular statement or charge is true, "further or otherwise," than as he has explained it. [c] This is the meaning

[a] M ff. 254.

[b] Hinde, 197.

[c] This bears some analogy to the "*sophisma plurium interrogationum*" of the logicians, where inconsistent points are involved in one question, *ex. gr. suntne mel et fel dulcia? Evitantur insidias ad singulas questiones seorsim respondendo.*

of a *traverse* in an answer, so frequently to be met with in the books as *contra-distinguished* from a direct denial; and although it is now marked by the technical words *absque hoc*, it is, to all intents and purposes, a *traverse*, being preceded by an inducement of matter inconsistent with the statement of the complainant, but which, without the denial in the conclusion, would not tender an issue; and this, we have seen, is the definition of a *traverse*, as explained in a former chapter. [a]

344. It is an observation worthy of the student's attention, that in order to make an answer sufficient, and thereby avoid exceptions, the words of the interrogation ought, as nearly as possible, to be followed, but so as that the charge may not be answered literally, but in substance. Thus it should be said, "this defendant admits, or denies it to be true;" or, "has been informed and believes it to be true, that," etc., following the words of the bill in the interrogating part. So, likewise, when the defendant disclaims all knowledge, he should say, "and this defendant doth not know, and cannot, as to his belief or otherwise, save as he is informed thereof by the said bill, answer or set forth whether," etc., repeating the interrogatory. The *traverse* is in this form: "this defendant, further answering, saith that," etc. (stating his case), "and this defendant further, or otherwise than as aforesaid, denies it to be true that," etc. (the words of the interrogatory.) If the defendant be interrogated to a point of law merely, and not of fact, instead of answering he submits the question to the decision of the court: "and this defendant submits it to this honorable court, whether," etc. We have already seen that many circumstances which would have been available as a defence by way of plea, may be insisted upon by answer—as where the defendant does not require to protect himself from discovery; [b] or where it might be doubtful whether the same defence would hold as a plea; [c] or where,

[a] *Vide ante*, Part 2, c. 1.

[b] *Mitt.* 249.

[c] 2 P. Wms. 145.



from the variety of matters to be put in issue, a plea would not achieve the object of shortening the suit and saving expense. [a] In this respect the answer confesses and avoids the particular allegation of the bill, similarly to what we have described when treating of pleas: "and this defendant admits it to be true that, etc., but then he saith that," etc. (stating the matter in objection); and it is a common but unnecessary practice to conclude with insisting upon having the same benefit of the objection so stated, as if the same were pleaded in bar to the relief, or *demurred* to as to the *discovery*, where it would cause a penalty or forfeiture, or a breach of confidence in a counsel, attorney, or arbitrator. [b] These are the only cases, as we have stated in the preceding chapter, in which the defendant can insist by answer against making a discovery; in all other cases where the defendant submits to answer, although he might have good ground for pleading or demurring, *he must answer fully*. [c]

345. It was formerly thought that if a defendant denied by his answer the foundation of the bill, as where he denied the complainant's title, or where such title had not been previously established at law, he might decline making any discovery as to those inquiries in the bill which rested on the assumption of the matter denied, [d] as of good title for instance, unless such discovery were material as affecting the controverted point. This has been long a *multum vexata questio*, and one which Lord Eldon termed a "distracted point"; [e] for the cases abound with contradictions and nice and subtle distinctions upon the subject. [f] But the question is now put completely at rest, it having been recently decided "that a defendant cannot by answer object to answering, though by plea he may;" [g] and Sir John Leach, expressing his opinion

[a] 1 Atk. 54.

[b] *Ante*, p. 246.

[c] 3 Madd. Rep. 70.

[d] Mitf. 251-2-3.

[e] *Shaw v. Ching*, 11 Ves. 306.

[f] 2 Madd. Chan. Prac. 338-9.

[g] *Mazzaredo v. Maitland*, 3 Madd. Rep. 70.

on this point, said, "I think that this is so useful a rule, I shall always adhere to it." The allowing a contrary rule to prevail, would be to confound all just distinctions, and to do away all the advantages that result from adhering to systematic forms.

**346.** The old practice seems to have obtained from having allowed too great a latitude of construction to a different rule, namely: that where there is a series of questions depending upon a supposition of the fact upon which they are built being admitted, if that fact be denied, it would undoubtedly be superfluous to go on and give a particular negative to each query deduced from such presumed fact. But this rule relates to a single allegation and its consequents, and not to a point, which, if insisted on by a negative plea, would be a good objection to the discovery of independent matter; and the reason of this rule is, that the answer may not be rendered needlessly prolix by the insertion of that which is sufficiently denied by the previous answer.

**347.** For the similar purpose of avoiding prolixity, deeds or other writings should not ordinarily be set out *in hæc verba*, even though called for by the bills. [a] It is sufficient if they are referred to, and left with the clerk in court, for the complainant to take copies, if he thinks proper; or the court will order them to be produced on the examination of witnesses. [b] In all other respects, however, the answer to each inquiry must be full and precise; and although general accounts and inventories and such like, may be set out in schedules annexed to the answer, and which the defendant prays may be taken as part thereof, yet any particular question relating to such account, etc., must be answered specifically, and it will not be enough to refer generally to the schedule in answer to such particular query. [c] Most of the rules relating to the precision of answers are to be found in the following extract from

[a] Hinde, 193. Beames' Ord. Chan. 69. 163.

[b] Hinde, 193.

[c] 1 Bro. C. C. 502,

Lord Clarendon's orders: [a] "An answer to a matter charged as a defendant's own fact, must regularly be without saying 'to his remembrance;' or, 'as he believeth,' if it be laid to be done within seven years before, unless the court, upon exception taken, shall find special cause to dispense with so positive an answer; and if the defendant deny the fact, he must traverse or deny it (as the cause requires) directly and not by way of negative pregnant. [b] As, if he be charged with a receipt of a sum of money, he must deny or traverse that he hath not received that sum or any part thereof, or else set forth what part he hath received. And if a fact be laid to be done with divers circumstances, the defendant must not deny or traverse it literally, as it is laid in the bill, but must answer the point of substance positively and certainly."

**348.** An answer must not, no more than a plea or demurrer, be argumentative; [c] but should rely on matter of fact only. There is one more observation which the student will do well to recollect, namely: that when any admission which might operate against the defendant is followed by an avoidance or explanation, this should be one continuous sentence: for though the answer, when replied to, cannot be read at the hearing in support of the defendant's case, yet if part of any sentence be read by the complainant, the defendant will be entitled to have the whole of that sentence read; and, in like manner, when a sentence has a direct reference to a previous part of the answer, the defendant has a right to read the part referred to.

**349.** In order to give the student a general idea of the form of an answer, we shall here insert an answer to the skeleton bill given in a former chapter; and, as far as it may be done, with its several variations:

[a] Beames' Ord. Chan. 179.

[b] A *negative pregnant* is a negative, implying also an affirmative; as if the man being impleaded to have done a thing on such a day, or in such a place, denieth that he did it *modo et forma declarata*, which implieth, nevertheless, that in some sort he did it." Cowell. Beames' Ord. Chan. 179, n. 56.

[c] 11 Ves. 303.

**“The Answer of C. D. Defendant, to the Bill  
of Complaint of A. B. Complainant.**

“This defendant saving and reserving to himself, now and at all times hereafter, all and all manner of benefit and advantage of exception which can or may be had or taken to the said complainant's said bill of complaint, for answer thereto, or to so much thereof as this defendant is advised is in anywise material or necessary for him to make answer unto, answers and says he believes it to be true, that at the time in the said bill in that behalf mentioned, such events did take place as led to the relation now existing between the said complainant, A. B., and this defendant; and he admits it to be true, that such relation does in fact exist. And this defendant, further answering, saith, he admits it to be true, that the said complainant and this defendant are parties to such relation, under circumstances to which particular equitable incidents are concomitant; but then, he saith, such equitable incidents depend upon the performance of a condition precedent; and that such condition has never been performed by the said complainant, although this defendant hath always been ready and willing, and hereby offers to perform his part of the contract, whenever the said complainant shall have complied with terms thereof on his part. And this defendant, further answering, saith, that had the said complainant performed the said condition precedent, such duties as are in the said bill in that behalf set forth to be performed by this defendant, would have arisen from the said relation; but further or otherwise than as aforesaid, this defendant denies it to be true, that such duties as are in the said bill set forth to be performed by this defendant, did arise from the said relation. And this defendant denies it to be true, that the said complainant hath, by himself or his agents, or in any other manner, made such or the like applications and requests as are in the said bill in that behalf mentioned, or any applications and requests in respect of the matters in the said bill mentioned. And this defendant doth not know, nor can he as to his belief or otherwise, save as he is informed thereof

by the said bill, set forth whether the circumstances in the said bill charged are true, or how otherwise. And this defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by the said bill charged; *without this*, that there is any other matter, cause, or thing, in the said bill of complaint contained (material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied,) is true, to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct; and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained."

**350.** It can be scarcely necessary to observe that the above general form is given merely for the example; and that answers cannot pursue any precise method or arrangement, but must follow the circumstances of the case, and the allegations of the bill. For further answers, and the answers to amended bills, which are always considered as a continuation and part of the former answer, we refer the student to the Appendix. We have endeavored to mould the above form so as to give instances of—1, an assent; 2, admission; 3, confession and avoidance; 4, traverse; 5, denial; and 6, disclaimer of knowledge. The example of denial affords us also an apt illustration of the rule that it is useless to deny a fact, the negation of which is necessarily involved in the answer to a former question. Thus, as the defendant denies that any requests were made to him, it would be utter trifling to say that he did not refuse to comply with them, or why.

**351.** The conclusion, which is a common form, and now quite unnecessary, supplies us with an example of the formal traverse, with an *absque hoc*. This is a general traverse of every allegation in the bill which the answer did not specifically meet but formerly it was the custom to insert, immediately preceding the general traverse, a particular traverse of those parts of the bill which the defendant meant to deny; the

whole foregoing part of the answer being nothing but inducement, or a statement of the defendant's case, inconsistent with that made by the bill. [a]

**352.** As an infant is not bound by the answer put in for him by his guardian, and as the attorney general cannot be compelled to answer at all, [b] such answers cannot be excepted to; [c] and they are, therefore, seldom full. For the form of those answers, as well as for *disclaimers*, which are a species of answer filed by persons made defendants, who claim no interest or concern in the suit, we must refer the student to the Appendix.

[a] The student will find in the Appendix the precedent of a bill, and an answer to it in the old form, taken from the *Cursus Cancellarie*, p. 125, *et seq.*

[b] Dick. 730.

[c] Madd. Cha. Prac. 336, and the cases cited in the note. Mitf. 254.

## CHAPTER VI.

## The Replication.

**353.** When the answer, according to the practice which formerly prevailed, was only a statement of the defendant's case in reply to the bill, and not, as at the present day, a full discovery of all the matters charged, it usually became necessary for the complainant to make a special replication to such statement in the answer, which was followed by a special rejoinder, rebutter, and so on, until a distinct issue was joined, as at common law. But, as the practice now stands, the answer being a full discovery to every point, the complainant may find sufficient admissions in the answer, upon which to ground a decree; whereupon he proceeds to a hearing upon bill and answer only. If the admissions be accompanied by a statement in avoidance, the complainant will be allowed, instead of replying specially to the new matter, to amend his bill and extract fresh discovery. The amended bill, therefore, and further answer supply the place of special pleadings, which are now obsolete; and the reason why this practice has obtained in equity, though not at common law, is that the great object of *special* pleading at common law is to keep the law and the fact distinct, they being to be tried by separate tribunals; but in equity the whole question comes before the court for its decision, both on the pleadings and the proofs.

**354.** When the defendant, by his answer, denies the material facts of the bill, an issue is then *tendered* upon them, and the complainant must *join* issue and prove the facts thus disputed by the testimony of two witnesses at least, against the positive oath of the defendant. (a) Such issue is joined by a general replication, that the complainant *will aver and prove his bill to be true, certain and sufficient*; which is an issue, both as to

(a) 2 Chan. Ca. 8. 1 Vern. 161. 3 Atk. 270. 649.

the law and the facts, according to the constitution of the court. When the answer advances a new statement on behalf of the defendant, the complainant should *tender* an issue to the new facts and oblige the defendant to prove them, as otherwise they will be taken to be true. This also is done by the general replication, stating *that the answer of the defendant is uncertain, untrue and insufficient*, which *tenders* an issue, both of law and fact, on which the defendant *joins* issue by a formal rejoinder—a pleading which is supposed to be filed, but is never actually drawn—the practice being to serve the defendant with the *subpœna ad rejungendum* (unless he submits to rejoin *gratis*), which is equivalent to a notice of replication, and issue is then joined between the parties. (a) Hence we find that the replication in equity only serves as a mere form for producing an issue, and as such it need not be signed by counsel. (b) The form of it is as follows:

The Replication of A. B., complainant,  
to the Answer of C. D., defendant.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith, that he will aver and prove his said bill to be true, certain and sufficient, in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; *without this*, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law, to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is, and will be, ready to aver, due prove, as this honorable court shall direct; and humbly prays, as in and by his said bill he hath already prayed.

The general replication concludes the pleadings in equity.

(a) *Vide ante*. p. 80. Mos. 123, 296.

(b) Hinde, 285.



**I. OBJECTIONS TO THE JURISDICTION:—**

- 1st. Want of equity.
- 2d. Jurisdiction in some other court of equity.

**II. OBJECTIONS IN ABATEMENT:—**

- 1st. Personal disability.
  1. Outlawry.
  2. Excommunication.
  3. Attainder.
  4. Alien enemy.
  5. Infancy.
  6. Coverture.
  7. Lunacy, or idiocy.
- 2d. Mode of proceeding defective.
  1. Another suit depending.
  2. Want of proper parties.
  3. Multifariousness.
  4. Splitting of suits.
  5. Want of proper affidavit annexed, etc.

**III. OBJECTIONS IN BAR:—**

- 1st. To deny the relation assumed by the bill.
  1. By answer.
  2. By negative plea.
    1. Which denies the character attributed to either complainant or defendant by the bill.
    2. Which denies that the defendant has such an interest as can make him liable.
- 2d. To invalidate the relation.
  1. Parties incapable to contract.
    1. Alien purchasers, etc.
  2. Contract illegal, insufficient, or altered.
    1. Illegality, or insufficiency of the consideration.
    2. Statute of Frauds.
    3. Want of title in plaintiff *ab initio*.
    4. Want of present interest.
    5. Bankruptcy or insolvency.
    6. Forfeiture.
  3. The right being contingent, did not accrue.
    1. The non-performance of a condition precedent.
- 3d. That no right ever existed.
  1. Want of privity.
  2. A purchase for valuable consideration, without notice.
  3. Title paramount.
- 4th. That the right, though once existing, is barred.
  1. By the act of the party.
    1. Stated account.
    2. Award.
    3. Release.
  2. By the act of law.
    1. A fine and non claim.
    2. A Recovery.
    3. A Judgment.
    4. A Decree, or dismissal of the suit.
  3. By the act of God.
    1. Contract becomes impossible to be performed.

**N. B.** The mode of defence which denies the *right* is applicable where any of the above objections are apparent on the face of the bill.

# FORMS.

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## BILLS (ADDRESS OF.)

### 1. *In Chancery.*

To the Right Honorable the Earl of Eldon, Lord High Chancellor of Great Britain.

Humbly complaining, etc.....Lordship.

### 2. *When the Seals are in Commission.*

To the Right Honorable A. B., C. D., and E. F., Lords, Commissioners for the custody of the Great Seal of Great Britain.

Humbly, etc.....Lordships.

### 3. *In the Exchequer.*

To the Right Honorable Frederick Robinson, Chancellor and Under Treasurer of his Majesty's Court of Exchequer at Westminster; the Right Honorable Sir Richard Richards, Knight, Lord Chief Baron of the same Court, and the rest of the Barons there.

Humbly, etc.....Honors.

### 4. *In the Chancery of Lancaster.*

To the Right Honorable Charles Earl of Liverpool, Chancellor of the Duchy of Lancaster, and one of his Majesty's Most Honorable Privy Council.

Humbly, etc.....Lordships.

### 5. *In the Great Sessions of Wales*

To the Honorable A. B. and C. D., Esqrs., his Majesty's Justices of the Great Sessions for the several Counties of Glamorgan, Brecon and Radnor.

Humbly, etc.....Lordships.

### 6. *In the Lord Mayor's Court.*

To the Right Honorable A. B., Lord Mayor of the City of London, and the Worshipful, his Brethren, the Aldermen of the same City.

Humbly, etc .....Lordship and Worships.

## COMMENCEMENT.

### 1. *In Chancery.*

Humbly complaining, sheweth unto your Lordship, your orator, A. B., of (*place of abode and addition*), that, etc., etc.

### 2. *In the Exchequer.*

Humbly complaining, sheweth unto your *Honors*, your orator, A. B., of, etc., debtor and accountant to his Majesty, as by the records of this honorable court, and otherwise it doth or may appear, that, etc.

### 3. *By a Peer.*

Complaining, sheweth unto your Lordship, your orator, the Right Honorable A. Earl of B. (*or as the case may be*), that, etc.

### 4. *By a Body Corporate.*

Humbly complaining, show unto your Lordship, your orators, the Mayor, bailiffs, and commonalty of the City of A., that, etc.

**5. *By Creditors, Legatees, etc., on behalf of themselves and other Creditors.***

Humbly complaining, show unto your Lordship, your orators and oratrixes, A. B., of, etc., C. D., of, etc., E. F., of, etc., spinster, G. H., of, etc., on behalf of themselves and all other the bond and simple contract creditors (*or legatees or next of kin*) of I. J., late of, etc., deceased, who shall come in and contribute to the expenses of this suit, that, etc.

**6. *By an Infant.***

Humbly complaining, sheweth unto your Lordship, your orator, A. B., an infant under the age of 21 years, that is to say, of the age of — years, or thereabouts. by C. D., of, etc., his (*relation*) and next friend, that, etc.

**7. *By a Feme Covert.***

Humbly complaining, show unto your Lordship, your orator and oratrix, A. B., of, etc., and C., his wife, that, etc.

**8. *By a Feme Covert, claiming in opposition to her Husband.***

Humbly complaining, sheweth unto your Lordship, your oratrix, C., the wife of A. B., etc., by D. E., her next friend, that, etc.

**9. *By a Feme Covert whose Husband is an Exile, etc.***

Humbly complaining, sheweth unto your Lordship, your oratrix, A. B., of, etc., the wife of C. B., late of, etc., who hath by due course of law been sentenced to transportation to parts beyond the sea, where he now is (*or who hath abjured the realm, or who is an alien enemy*), that, etc.

**10. *By a Lunatic.***

Humbly complaining, show unto your Lordship, your orators, A. B., of, etc., and C. D., late of, etc., but now of, etc., against whom a commission of lunacy has lately been awarded and issued, and is now in force and under which commission the said C. D. was duly found and declared to be a lunatic, and your orator, A. B., appointed committee of his estates; that, etc.

11. *Information on behalf of the Crown.*

Informing, sheweth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, on behalf of his Majesty, that, etc.

12. *Information on behalf of those who partake of the Prerogative.*

Informing, sheweth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, on behalf of his Majesty, and the masters, fellows, and scholars of Trinity College, Cambridge, (or as the case may be) that, etc.

13. *Information with a Relator.*

Informing, sheweth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, at and by the relation of C. D., clerk, vicar of the parish of E., and F. G. and H. J., churchwardens of the same parish, for and on behalf of themselves and the rest of the parishioners of the said parish, (or as the case may be) that, etc.

14. *Information and Bill.*

Informing, sheweth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, at and by the relation of C. D. and E. F., of, etc., and humbly complaining shew unto your Lordship, the said C. D. and E. F., that, etc., (*statement.*) And his Majesty's Attorney General, by the relation aforesaid, informeth; and your orators further shew unto your Lordship, that, etc.

15. *Information on behalf of a Lunatic.*

Informing, sheweth unto your Lordship, Sir A. B., Knight, his Majesty's Attorney General, on behalf of C. D., a lunatic, at and by the relation of E. F., of, etc., that, etc.

16. *Information for the Queen.*

Informing, sheweth unto your Lordship, A. B., Esq. Attorney General of her Majesty the Queen Consort, that, etc.

*Statement of Requests and Charge of Confederacy.*

And your orator hath accordingly, both by himself and his agents, frequently and in a friendly manner applied to and requested the said C. D. and E. F., (*the defendants*) to, etc.; and your orator well hoped that such his just and reasonable requests would have been complied with, as in justice and equity they ought to have been. But now so it is, may it please your Lordship, the said C. D. and E. F., combining and confederating with divers other persons at present unknown to your orator, but whose names, when discovered, your orator prays he may be at liberty to insert in this his bill, with apt and proper words to charge them as parties defendant hereto, and contriving how to injure and oppress your orator in the premises, the said C. D. and E. F., absolutely refuse to comply with your orator's aforesaid reasonable requests; and to countenance such their unjust conduct, they sometimes pretend that (*pretences and charges*). All which actings, pretences, and refusals of the said confederates, are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises.

*Clause of Equity, and Commencement of the Interrogating Part.*

In consideration whereof, and forasmuch as your orator is without remedy in the premises at common law, and cannot have adequate relief except in a court of equity, where matters of this sort are properly cognizable and relievable; to the end that the said C. D. and E. F., and their confederates, when discovered, may upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, perfect, and distinct answers make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they thereunto severally and respectively, distinctly interrogated; and more especially that the said defendants, C. D. and E. F., may, in manner aforesaid, answer and set forth whether, etc.

## SPECIAL INQUIRIES.

### 1. *As to Applications and Requests.*

And whether your orator hath not by himself or agents, or how otherwise, made such applications and requests to the said defendants, as are hereinbefore in that behalf mentioned, or some such or the like, or any, and what other applications and requests in respect of the several matters aforesaid, and whether the said defendants have not refused to comply therewith, and why?

### 2. *As to a Deed set forth in the Bill.*

Whether such indenture, bearing date on or about the — day of —, as hereinbefore particularly mentioned, was not made between such parties as hereinbefore set forth, or some, and which of them, and was not of such purport as hereinbefore stated; or whether some indenture of some and what date was not made between some and which of the said parties, and was not of some such or the like purport or effect, or how otherwise.

### 3. *For an Account of Money had and received.*

And that the said defendants may set forth an account of all and every sum and sums of money received by them or either of them or by any person or persons by their or either of their order, or for their or either of their use, for or in respect of the said (*as the case may be*), and when and from whom, and from what in particular all and every such sums were respectively received, and how the same respectively have been applied or disposed of.

### 4. *For an Account of the Rents and Profits of a Testator's Real Estate.*

And that the said defendants may set forth a full, true, and just rental and particular of the real estates, whereof or whereto the said testator was seised or entitled in fee simple, at the time of his death; and also a full, true and particular

account of all and every sum and sums of money, which hath or have been received by them, or either of them, or any other person or persons by their or either of their order, or for their or either of their use, for or in respect of the rents and profits of the said estates, or any part thereof; and whether any, and which of the said estates, or any part or parts thereof, have or hath not been sold or disposed of, and at what price or prices respectively, and when and to whom; and whether such price or prices respectively have or hath not been paid, and to whom; and if not, why not.

5. *For an Account of Personals.*

And that the said defendants may discover and set forth a full, true, and particular account of all and singular the personal estate and effects of the said testator, and of every part thereof, which hath been possessed by or come to the hands of the said defendants, or either of them, or to the hands of any other person or persons, by their or either of their order, or for their or either of their use; with the particular nature, quantities, qualities, and true and utmost values thereof, and of every part thereof respectively; and how the same, and every part thereof, hath been applied and disposed of; and whether any and what part thereof, now remains unapplied and undisposed of, and why; and whether any, and what part of such personal estate remains outstanding, to any, and what amount, and why; and that the said defendants may also set forth an account of the debts due from the said testator, and of his funeral expenses and legacies; and whether any, and which of such debts are outstanding; and why.

6. *For the Production of Deeds and Papers.*

And that the said defendants may set forth a list or schedule and description of every deed, book, account, letter, paper, or writing relating to the matters aforesaid, or any of them, or wherein or whereupon there is any note, memorandum, or writing, relating in any manner thereto, which now are, or ever were, in their or either, and which, of their possession or power, and may particularly describe which thereof now are in



their, or either, and which of their possession or power, and may deposit the same in the hands of their clerk or clerks in court, for the usual purposes; and otherwise that the said defendants may account for such as are not in their possession or power.

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1. *Prayer for General Relief.*

And that your orator may have such further and other relief in the premises, as to your Lordships shall seem meet, and the nature and justice of the case may require, may it please, etc.

2. *Prayer of Bill of Revivor.*

To the end therefore that the said suit and proceedings therein may stand revived against the said C. D. and be restored to the same plight and condition as the same were in at the time of (*abatement*), or that the said C. D. may show good cause to the contrary, may it please, etc.

3. *Conclusion of Prayer in a Bill of Discovery.*

And that your orator may have a full disclosure and discovery of all and every the matters and things aforesaid, may it please, etc.

*Prayer of a Bill to perpetuate Testimony.*

And that your orator may be at liberty to have his witnesses examined to the several matters and things hereinbefore mentioned, so that the testimony of the said witnesses may be preserved and perpetuated; and that your orator may be at liberty on all future occasions, to read and make use of the same, as he shall be advised, may it please, etc.

*Clause of Equity in the same.*

In consideration whereof, and forasmuch as your orator cannot have the said witnesses examined in order to perpetuate their testimony, without the aid of a court of equity, to the end, etc.

### 5. *Prayer of Bill of Interpleader.*

And that the said C. D. and E. F. may be decreed to interplead and adjust their said several claims and demands between themselves, your orator being willing and desirous that the said (*demand*) should be paid to such of the said defendants as shall appear to be entitled thereto, and your orator doth hereby offer to pay the same into the hands of the accountant-general of this honorable court, to be disposed of as this honorable court shall direct (*if injunction*)—

### 6. *Prayer for an Injunction.*

And that in the meantime, the said C. D. and E. F., their counsel, solicitors, agents and attorneys may be restrained by the order and injunction of this honorable court, from prosecuting or commencing any action or actions at law against your orator, for or in respect of the several matters aforesaid, and that your orator, etc. (*general relief.*)

### *Clause of Equity, in a Bill of Interpleader.*

In consideration whereof, and forasmuch as your orator is remediless in the premises, without the aid of a court of equity where the said several claimants may interplead and settle and adjust their several rights and demands between themselves. so that your orator may be enabled to pay the said (*demand*) with safety, to the end, etc.

### 7. *Conclusion of Certiorari Bill.*

In consideration whercof, and forasmuch as for want of jurisdiction in the said (*court below*) your orator is remediless there; and your orator is advised that he is entitled to have a writ of *certiorari* issued from this honorable court, and directed to (*court below*) commanding him to certify and remove the said bill, and all proceedings thereon, unto this honorable court; may it therefore please, etc.

### 8. *Prayer of Bill of Review.*

And that for the reasons aforesaid, the said cause and decree therein pronounced, may be reviewed by this honorable court, and that the said decree may be reversed for error apparent therein, and no further proceedings taken thereon; may it please, etc.

## DEMURRERS, PLEAS AND ANSWERS.

*(Title of.)*

The Answer (or Plea, or Demurrer) of C. D., the defendant (or one of the defendants) to the bill of complaint of A. B., complainant.

*Joint and Several Answers.*

The joint and several Answer of C. D. and E. F. the defendants (or two of the defendants) to the bill of complaint of A. B. complainant.

*Infant's Answer.*

The Answer of C. D., an infant under the age of twenty-one years, by E. F., his guardian, one of the defendants to the bill of complaint of A. B., complainant.

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1. *Commencement and Conclusion of an Answer.*

This defendant, saving and reserving to himself now, and at all times hereafter, all and all manner of benefit and advantage of exception, which can or may be had or taken to the said complainant's said bill of complaint, for answer thereto, or to so much thereof as this defendant is advised is in anywise material or necessary for him to make answer unto, and answers and says, etc. . . . (conclude.) And this defendant denies all and all manner, etc.

2. *Joint Answer.*

These defendants, etc., (as before) each answering for himself (and herself) and not the one for the other, jointly and severally answer and say, etc.; and these defendants deny all, etc.

3. *Infant's Answer.*

This defendant, answering by his said guardian, saith, that he is an infant of the age of ——— years, or thereabouts, and

he therefore submits his rights and interests in the matters in question in this cause, to the protection of this honorable court; without this, that, etc.

4. *Title of further Answer, and of Answer to Amended Bill.*

The further Answer of C. D., defendant to the (*original*) bill, (*and his answer to the amended bill*) of complaint of A. B., complainant.

This defendant, saving and reserving to himself the same benefit of exception to the said (*original*) (*and amended*) bill, as by his former answer to the said (*original*) bill is saved and reserved, for answer thereto, etc.: (*conclude*) without this, that, etc.

5. *Answer and Disclaimer.*

The Answer and Disclaimer of C. D., one of the defendants, to the bill of complaint of A. B., complainant.

This defendant, etc.; (*conclude.*) And this defendant saith, that he never had, or claimed, or pretended to have, nor has he now, nor does he claim, or pretend to have any right, title, or interest of, in, or to the said (*matter in question*) or any part thereof; and this defendant disclaims all right and title of, in, or to the same, and every part thereof; and this defendant denies, etc.

6. *The Answer of a Formal Party, who is a stranger to the Facts charged.*

This defendant, saving and reserving to himself, etc., answers and says, that he is a stranger to all and singular the matters and things in the said complainant's bill of complaint contained, and therefore leaves the complainant to make such proof thereof as he shall be able to produce, without this, that, etc.

*N. B.* This is the usual answer of the Attorney General.

7. *Conclusion of an Answer, claiming the same Benefit of Defence as if the Bill had been demurred to for want of Equity.*

And this defendant submits to this honorable court, that all and every of the matters in the said complainant's bill men-

tioned and complained of, are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity; and this defendant hopes he shall have the same benefit of this defence as if he had demurred to the said complainant's bill; and this defendant denies, etc.

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## THE COMMENCEMENT AND CONCLUSION OF A DEMURRER.

### 1. *To the whole Bill.*

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true, in such manner and form as the same are therein set forth, doth demur thereto; and for cause of demurrer sheweth, that, etc. (*conclude.*) Wherefore, and for divers other causes of demurrer, appearing in the said bill, this defendant humbly demands the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed, with his reasonable costs, in this behalf most wrongfully sustained.

### 2. *Demurrer to Part of the Bill, and Answer to the Residue.*

This defendant, by protestation, etc., as to so much of the said bill as seeks (*parts demurred to*), doth demur; and for cause of demurrer sheweth, that, etc. (*conclude.*) Wherefore, and for divers other causes of demurrer, appearing in the said bill, this defendant humbly demands the judgment of this honorable court, whether he shall be compelled to make any further answer unto such part of the said bill as is so demurred unto as aforesaid; and as to the residue of the said bill, this defendant not waiving his said demurrer, but relying thereon, and saving and reserving to himself, etc. (*as before, vide answer.*)

### 3. *Commencement and Conclusion of a Plea.*

This defendant, by protestations, etc. (*as in demurrer*), doth plead thereto, and for plea saith, etc. (*conclude.*) All which matters and things this defendant doth aver to be true, and is ready to prove, as this honorable court shall direct Wherefore, he doth plead the same (*in bar, or as the case may be*) to the said bill, and humbly demands the judgment, etc. (*as in demurrer.*)

### 4. *Plea to Part, and Answer to Residue of Bill.*

(*Is the same as Demurrer and Answer, mutatis mutandis.*)

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## EXCEPTIONS.

### 1. *To an Answer.*

Between A. B.....Complainant,  
and C. D. ....Defendant.

Exceptions taken by the said complainant to the answer put in by the said defendant, C. D., to the said complainant's bill of complaint.

1st. For that the said defendant, C. D., has not, to the best and utmost of his knowlege, remembrance, information and belief, answered and set forth whether (*the interrogatory verbatim as in the bill.*)

2d. For that the said defendant hath not, in manner aforesaid. answered and set forth whether, etc.

In all which particulars the said answer of the said defendant, C. D., is, as the said complainant is advised, imperfect, insufficient and evasive; and the said complainant therefore excepts thereto, and prays that the said defendant, C. D., may put in a further and better answer to the said bill of complaint.

## 2. *Exceptions to Master's Report.*

**In Chancery.**

Between { A. B., Complainant,  
and  
C. D. Defendant.

Exceptions taken by the said complainant to the report of E. F., Esq., one of the masters of this honorable court, to whom this cause stands referred, bearing date the       day of

First exception: For that the said master has, in and by his said report, certified, etc. (*as the case may be.*) Whereas, the said master ought to have certified that, etc.

Second exception: For that the said master hath certified, etc.

In all which particulars the report of the said master is, as the said defendant is advised, erroneous, and the said defendant appeals therefrom to the judgment of this honorable court.

## INTERROGATORIES.

*For the Examination of Witnesses.*

**In Chancery.**

Between A. B., Complainant, and C. D. and E. F., Defendants.

Interrogatories to be exhibited to witnesses to be produced, sworn and examined in this cause, now depending and at issue in this honorable court.

On the part of the said complainant:

1st. Do you know the parties, complainant and defendant, in the title of these interrogatories named, or any and which of them, and how long have you known them, or any and which of them, respectively? Declare the truth of the several matters by this interrogatory inquired after, according to the best of your knowledge, remembrance and belief, with your reasons at large.

2d Interrogatory: Whether or no, etc. (*as the case may be*), declare, etc.

Lastly: Do you know, or can you set forth, any other matter or thing which may in anywise tend to the benefit or advantage of the complainant in this cause? If yea, set forth the same, and all the circumstances and particulars thereof, as if you had been interrogated thereto, according to the best of your knowledge, remembrance and belief, with the reasons for such your belief, fully and at large.

*Interrogatories before the Master (title of).*

In Chancery.

Between A. B. and C. D., Complainants, and E. F. and G. H., Defendants.

Interrogatories to be exhibited before I. J., Esq., one of the masters of this honorable court, for the examination of (*as the case may be*), pursuant to an order made in this cause (*or as the case may be*), bearing date the —— day of ——, in the year

First interrogatory, etc., etc.

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## \* PRECEDENT OF A BILL AND ANSWER.

*(From the Cursus Cancellariæ.)*

*A Bill to cause one to show his Writings, whereby he holds his Lands, etc.*

Humbly complaining, W. B. sheweth, etc.: That, *whereas*, about four years last past, one T. L., of, etc., upon a certain judgment in a plea of debt, amounting to the sum of, etc., or thereabouts, by him obtained in her Majesty's court of common pleas, against one G. L., of M., in the county of, etc., sued forth her Majesty's writ of *fieri facias*, directed to the sheriff of the said county, for the levying of the said debt of the goods and chattels of the said G. L. By virtue of which

\* Referred to in page 377.



writ the said sheriff did, amongst other things, take into his hands one lease for divers years yet to come, made to the said G. L. by one T. S., in the county of D., Esq., of three parcels of land, called or known by the name or names of, etc., with all and singular their appurtenances, lying and being in the parishes of, etc., in the said county of, etc., together with all and singular woods, underwoods and trees, growing or being in or upon the premises, or any part thereof; together, also, with the reversion and reversions of the premises aforesaid, and of every part and parcel thereof, together with all manner of commons, ways, estovers, profits, commodities, hereditaments, and appurtenances to the same premises, belonging or appertaining. And afterwards, that is to say, on the — day of, etc., he, the said sheriff, by his deed bearing date, etc., under his hand and seal, did, in consideration of, etc., to him paid towards the satisfaction of the debt and the judgment aforesaid, bargain, sell, assign and set over the said lease and term of years yet to come, of all and singular the said premises, unto one W. B., of London, Gent. Which said W. B., not long after did, in consideration of, etc., by your orator to him paid, bargain, sell, assign and set over unto your orator, all and singular the said premises, and every part thereof; upon which bargain, sale, and assignment of the said premises so made as aforesaid, your orator was in very good hopes to have peaceably and quietly entered into the said premises, and so to have held, occupied and enjoyed the same accordingly. *But now* so it is, may it please your Lordship, that one T. R., of, etc., pretending to have a lease for divers years yet to come, of some part of the said lands made unto him by the said G. L., long time before any such sale or assignment made thereof to your orator as aforesaid, hath and still doth keep your orator out of the possession of the said lands and premises; upon which lease or demise he, the said T. R., pretends a certain yearly rent is reserved to the said G. L., his executors or assigns; which rent (if any be), your orator hath heard is, etc., by the year, and which your orator, by reason of the lawful conveyance to him made as aforesaid, ought, both in reason and good conscience, to have and enjoy during such

term as the said T. R. shall hold and occupy the land aforesaid, by reason of the said lease which he so pretendeth to have. But forasmuch as your orator doth not certainly know whether the said T. R. has any such lease, or (if he hath any such lease) what date the same beareth, nor what term the said T. hath therein unexpired, nor what rent is thereby reserved, nor what covenants are therein contained; and also, forasmuch as your orator cannot, by the strict rules of law, enter into the premises, nor knoweth how in due form of law to commence any action against the said T. R., either for the recovery of the said land or the rent aforesaid. And for that the said T. R. doth not only use and occupy the said lands and premises to his own profit and advantage, without yielding or paying any rent therefor to your orator, or to any other person lawfully claiming the same, but doth also utterly refuse to show his said lease whereby he claimeth to hold the said lands aforesaid, either to your orator or any other person; and for that the said T., in combination and confederacy with, etc. (*as the usual clause of confederacy.*) All which actings and doings of the said T., etc., are contrary to right, equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator. In tender consideration whereof, and forasmuch as your orator is remediless, etc. (*as usual*); and for that your orator hath no ordinary way by the ordinary course of the common law to enforce the said T. R. to produce or show to your orator such writings as he hath for the holding and occupying the lands aforesaid, but is altogether destitute of the means to have a sight of the same, but by the aid and assistance of this honorable court. To the end, therefore, that the said T. R. may be enforced upon his oath to discover what right he hath to the premises, or any part thereof, and what rent or rents he hath paid for the same, and to whom; and that he may also set forth in his answer, upon oath, a true copy or true copies of such lease or other writings *in hæc verba*, whereby he claimeth the premises aforesaid, or any part thereof; and that the said T. may truly and directly answer upon oath all the matters and things hereinbefore contained, as fully and perfectly as if the same

had been here again repeated and interrogated, and may particularly set forth upon oath whether. etc. May it therefore please your Lordship to grant, etc., process prayed, vers. T. R.

*The Answer of T. R., Defendant, to the Bill of Complaint of W. B., Gent, Complainant.*

The said defendant now, and at all times hereafter, saving, etc., saith, That the said G. L. named in the complainant's said bill, was possessed for divers years yet to come of the said parcels of land in the said bill mentioned, and called or known by the name of, etc., by virtue of a lease thereof, made by the said T. S. Esq., in the said bill also named, unto the said G. L. long before the supposed extent specified in the said bill of complaint. And the said G. L. so being thereof possessed long before the supposed extent (if any such there were) had in such manner as in the said bill of complaint is supposed, made a lawful demise and lease of part of the said three parcels of land, containing fourteen acres, or thereabouts, unto the said defendant, for divers years yet to come; upon which lease the said G. L. reserved a yearly rent, to be paid during the continuation of the said lease; by force of which lease the defendant entered into the said fourteen acres, part of the said three said parcels of land, and was, and yet is lawfully possessed accordingly, and ever since hath, and yet doth enjoy the same, by virtue of the said lease and demise, and is thereby to have and enjoy the same during the continuance of the said years, of which there are at this time about sixty years to come and unexpired, and saith, That the complainant is a person altogether unknown to this defendant, being one he, this defendant, never had any dealings or correspondence with, and therefore this defendant cannot but wonder at this suit, commenced by the said complainant against this defendant, touching the premises. And this defendant saith, That the said G. L., after the said lease and demise so made to the said defendant, of the said fourteen acres of land as aforesaid, and before the said supposed extent, made a grant and assignment of the interest and term of the said G. L., as well of the fourteen acres, which the said defendant hath and occupieth by virtue of the

said lease, for divers years thereof yet to come and undetermined; as also of the residue of the said three parcels of land mentioned in the said bill of complaint, unto H. L., son of the said G. L., unto which grant and assignment the said defendant was privy. And therefore this defendant humbly conceives, and is advised, That he, this defendant, is, for the payment of his rent, chargeable, and ought by the law to pay, the same rent so reserved, unto the said H. L., and not to the said complainant, which said R., this defendant, doth verily think is the lawful landlord during the said term for years yet to come, and not the said complainant, who is altogether a stranger to this defendant, and saith, That the said complainant never at any time heretofore demanded any rent for the said part of the land that this defendant hath, and occupieth, by virtue of the said lease for years; And also saith, that he is sued by the said W. B. in the said bill of complaint named, in her Majesty's Court of Queen's Bench, in an action of debt brought by him against the said defendant; and therefore the said defendant is somewhat surprised at this suit brought against him by the said complainant, touching the premises, whereby this defendant is wrongfully vexed, and sued without any just cause; *without that*, that there is any such extent made of the said three parcels of land, called. etc.; or that after the same extent there was any such bargain and sale made by the sheriff of the said term and lease for years to the said W. B. as in the said bill is set forth, or that the said W. B. bargained or sold the premises to the complainant, or that the said complainant ought to have and enjoy the said premises to the knowledge of this defendant. And without that there is any other matter, cause, etc., (*as before.*)



# **RULES OF PRACTICE**

**FOR THE**

## **COURTS OF EQUITY OF THE UNITED STATES.**

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Rules promulgated February Term, 1822, 7 Wheat. v. Superseded by rules promulgated March, 1842, 17 Peters, lxi. Abrogated by Rules of Supreme Court, Edition of 1866.

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### **PRELIMINARY REGULATIONS.**

#### **RULE 1.**

**Court, when open.** — The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.

#### **RULE 2.**

**Clerk's office.** — The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing all motions, rules, orders, and other proceedings, which are grantable of course, and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

#### **RULE 3.**

**Orders, rules, etc.** — Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule days

at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

**Orders, etc., in term.**—No formal notice is required of orders or motions made in term, in presence of counsel. *McLean v. Lafayette Bank*, 3 McLean, 503.

#### RULE 4.

**Entry of motions, rules, and orders.**—All motions, rules, orders and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

**Notice of motion.**—Motions grantable of course do not require notice other than entry in the order book. *U. S. v. Parrott*, 1 McAll. 455; *Bronson v. Kensey*, 3 McLean 180; *Halder*

man v. Halderman, Hemp. 407. Motions which must be allowed by the court or judge require in addition a special notice. U. S. v. Parrott, 1 McAll. 455; Wilkins v. Jordan, 3 Wash. 226; Bennett v. Hoefner, 17 Blatchf. 341; Bronson v. Kenney, 3 McLean 180; Gray v. Chicago etc. Co. 1 Woolw. 63. Wherever the entry is not made in the order book, the party has not notice. Newby v. Oregon etc. R. R. Co. 1 Sawy. 63.

### RULE 5.

**Motion for process, etc., as of course.**—All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions, and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

**Clerk's allowance, conditional.**—The clerk's allowance of a motion may be suspended or altered by the judge, as justice may require. Poultney v. Lafayette, 12 Peters, 472.

### RULE 6.

**Motions and orders not grantable of course.**—All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

**Motions, etc., not grantable of course.**—Motions and orders which require allowance by the judge or special notice to adverse party are not grantable of course. U. S. v. Parrott, 1 McAll. 477.



**PROCESS****RULE 7.**

**Compulsory process.** — The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

**Process, issuance of.** — Process in the circuit courts can only be issued within the limits of their respective districts (*Herdon v. Ridgway*, 17 How. 424); and against a person not an inhabitant of or found in the district process will not issue (*Picquet v. Swan*, 5 Mason, 35); therefore the attachment of property to compel appearance can only be used where persons are amenable to the process of these courts. *Toland v. Sprague*, 12 Peters, 300; *Nazro v. Cragin*, 3 Dill. 474; *Picquet v. Swan*, 5 Mason, 35; *Ex parte Graham*, 3 Wash. C. C. 456.

**RULE 8.**

**Final process.** — Final process to execute any decree may, if the decree be solely for the payment of money, be by writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds, or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court

or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

**Final process.**—Final process cannot be served outside of the district, except in another district in the same State; or where in favor of the United States, in any part of the United States. Revised Statutes, §§ 935, 986, *ante*; Toland v. Sprague, 12 Peters, 300. A discharge will not be granted under an execution until full and exact compliance with the decree. Gwin v. Breedlove, 2 How. 29; Griffin v. Thompson, 2 How. 245; McFarland v. Gwin, 3 How. 720.

### RULE 9.

**Writ of assistance.**—When any decree or order is for the delivery of possession upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

**Process, writ of assistance.**—The writ of assistance is an appropriate process against parties bound by decree who refuse to surrender possession. Terrell v. Allison, 21 Wall. 289; Pratt v. Burr, 5 Biss. 36. The power to act under this writ extends only to parties to suit and those coming in under them after suit commenced. Thompson v. Smith, 1 Dill. 458.

### RULE 10.

**Parties, how affected.**—Every person not being a party in any cause who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

### SERVICE OF PROCESS.

#### RULE 11.

**Subpoena, when to issue.**—No process of subpoena shall

issue from the clerk's office in any suit in equity until the bill is filed in the office.

### RULE 12.

**When returnable.**—Whenever a bill is filed the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

**Subpoena, when returnable.**—Subpoena must be made returnable at least twenty days after it is served or it is irregular. *Treadwell v. Cleveland*, 3 McLean, 233.

### RULE 13.

**Service, how made.**—The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

Amended May 3, 1872, 21 Wall. v.

**Subpoena, service of.**—Service of subpoena should be strictly according to the rule. *Hyslop v. Hoppock*, 5 Ben. 553. These courts have no means of effecting constructive service (*Parsons v. Howard*, 2 Woods, 1; *Reid v. Rochereau*, 2 Woods, 145); such service would not give these courts jurisdiction. *Hyslop v. Hoppock*, 5 Ben. 553. But where the court has jurisdiction of the parties, it may acquire jurisdiction of the subject-matter by substituted service (*Hitner v. Suckley*, 2 Wash. C. C. 465; *Segee v. Thomas*, 3 Blatchf. 11), on the attorney of the adverse party. *Read v. Consequa*, 4 Wash. C. C. 174. Such service is only good in cases of injunction to stay proceedings at law, and

in cross suits in equity, and then only on the attorney of adverse party in such proceedings. *Eckert v. Bauert*, 4 Wash. C. C. 370; *Ward v. Seabry*, 4 Wash. C. C. 426; *Ward v. Seabring*, 4 Wash. C. C. 472; *Doe v. Johnston*, 2 McLean, 323; *Dunn v. Clark*, 8 Peters, 1; *Lowenstein v. Glidewell*, 9 Blatch. 324. Such service is only allowed after application and order therefor (*Pac. R. R. Co. v. Mo. Ry. Co.* 1 McCrary, 647), on proof that it is impossible within a reasonable time to make actual or personal service. *Bronson v. Keokuk*, 2 Woods, 498. Service on the husband alone would have been good service on both husband and wife prior to amendment of rule. *Robinson v. Cathcart*, 2 Cranch C. C. 590. Service may now be made by leaving at place of abode with adult member of family. *O'Hara v. McConnell*, 3 Otto, 151; *Phoenix M. I. Co. v. Wulf*, 9 Biss. 285. No subpoena can be served out of the district for which it is issued. *Jobbins v. Montague*, 5 Ben. 429. Appearance without exception waives all irregularity in the service of subpoena. *Gracie v. Palmer*, 8 Wheat. 299; *Thayer v. Wales*, 5 Dill. 325. A general notice to persons to appear is not a subpoena. *Young v. Montgomery etc. Co.* 2 Woods, 607.

### RULE 14.

**Alias subpoena.**—Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties* against such defendant, if he shall require it, until due service is made.

### RULE 15.

**Who to make service.**—The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

**Service, how and by whom made.**—Process should be served by the marshal or his regular deputy (*U. S. v. Montgomery*, 2 Dall. 335), or by a deputy specially appointed by him (*Hyman v. Chales*, 12 Fed. Rep. 855), or by some other person specially appointed by the court (*Jobbins v. Montague*, 5 Ben. 429), as soon as can reasonably be done. *Kennedy v. Brent*, 6 Cranch, 187. The marshal will exercise his judgment and make his return at his peril (*Wortman v. Coyningham*, 1 Peters C. C. 241), and he is liable for any injury arising through failure to properly perform this duty on his own part (*Life & F. Ins. Co. v. Adams*, 9 Peters, 573; *Harriman v. Rockaway B. P. Co.*

5 Fed. Rep. 461), or through failure of his deputy. *U. S. v. Moore*, 2 Brock. 317.

### RULE 16.

**Entry on docket on return.** — Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

### APPEARANCE.

#### RULE 17.

**Day of.** — The appearance day of the defendant shall be the rule day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise, his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

**Entry of.** — The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

**Time of — Effect of.** — Defendant must usually appear within the time limited (*Treadwell v. Cleveland*, 3 McLean. 283), but further time will be granted when injustice will follow a refusal to do so. *Poulney v. Lafayette*, 12 Peters, 472. Defendants may waive process and appear, and are then bound as if regularly served. *Nelson v. Moon*, 3 McLean, 319; *Carrington v. Brent*, 1 McLean, 167. Regularity of service is admitted by appearance without exception in person (*Gracie v. Palmer*, 3 Wheat. 699; *Goodyear v. Chaffee*, 3 Blatchf. 263; *Marye v. Strouse*, 5 Fed. Rep. 404), or by attorney. *Knox v. Summers*, 3 Cranch, 436. Having appeared, defendant cannot complain that bill contains no prayer for process. *Segee v. Thomas*, 3 Blatchf. 11. Appearing for purpose of moving to dismiss for want of jurisdiction is a voluntary appearance (*Jones v. Andrews*, 10 Wall. 327), but appearing for purpose of moving to strike case from docket because no process had been served does not waive service. *Dore v. Gibbonney*, 3 Hughes, 382. Appearance after service by a fictitious name is not binding, nor does it make such person a party. *Kantuck etc. Co. v. Day*, 2 Sawy. 463. But appearance of a corporation by fictitious name is good, being an admission that such is its name. *Virginia etc. Co. v. U. S.*, Taney, 418. Where an appearance is unauthorized, the party is not bound by it (*Shelton v. Tiffin*, 6 How. 163),

but it is not necessary that the authority should appear on the record. *Osborne v. U. S. Bank*, 9 Wheat. 739.

## BILLS TAKEN PRO CONFESSO.

### RULE 18.

**Default.** — It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office, on the rule day next succeeding that of entering his appearance. In default thereof the plaintiff may, at his election, enter an order (as of course) in the order book that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

Amended October 28, 1878, 7 Otto, viii.

**Default.** — A bill cannot be taken for confessed when at same time defendant appears and tenders his answer (*Halderman v. Halderman*, Hemp. 407); but the court may impose such terms on defendant as are just. *Halderman v. Halderman*, Hemp. 407.

### RULE 19.

**Decree on default.** — When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed

absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

Amended October 23, 1878, 7 Otto, viii.

**Decree.**—A decree under this rule is merely *nisi*, and will not be made absolute until succeeding term of court. *Pendleton v. Evans*, 4 Wash. C. C. 336; *Boudinot v. Symmes*, Wall. C. C. 139; *O'Hara v. McConnell*, 3 Otto, 150. A default will usually be set aside, on motion, on condition that defendant plead to the merits and go to trial. *Kemball v. Stewart*, 1 McLean, 332. When irregularly entered default will be set aside on motion. *Fellows v. Hall*, 3 McLean, 281. Where defendant has appeared notice should be given of application for final decree after order *pro confesso*. *Bennett v. Hoefner*, 17 Blatchf. 341.

## FRAME OF BILLS.

### RULE 20.

**Introductory part.**—Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says, that," etc.

**Contents of, how set out.**—The introductory part of the bill must give with certainty the names of all the parties. *Barth v. MaKeever*, 4 Biss. 206. The use of fictitious names is not naming a party within the rule. *Kentucky S. M. Co. v. Day*, 2 Sawy. 468. But in a suit against an inanimate object the name thereof will be sufficient. *Str. Shark v. Lee Choi Chum*, 1 Sawy. 717. Domicil should be averred so that it can

be put in issue. *Harrison v. Nixon*, 9 Peters, 483, 505. The citizenship of every necessary party should be distinctly stated, and it must be shown that plaintiffs and defendants are citizens of different States. *Speight v. Meredith*, 4 Biss. 120; *Merserole v. Union P. C. Co.* 6 Blatchf. 356; *National Bank v. Baack*, 8 Blatchf. 137; *Dodge v. Perkins*, 4 Mason, 435; *Findlay v. U. S. Bank*, 2 McLean, 44; *Vose v. Philbrook*, 3 Story, 336. These matters should all be stated in the introductory part of the bill; it is not sufficient to state them in the caption only. *Jackson v. Ashton*, 8 Peters, 148. A bill "to the circuit court in chancery sitting" is sufficiently addressed. *Sterrick v. Pagsley*, 1 Flippin, 350.

### RULE 21.

**What to omit and what to state.**—The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defense or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno* or any other special order pending the suit, is required, it shall also be specially asked for.

**Contents of bill proper.**—The bill must contain on its face sufficient matter to maintain case of plaintiff (*Harrison v. Nixon*, 9 Peters, 483), but a general statement of the facts is sufficient; it is not necessary to set out all the minutia. *Dunham v. Railway Co.* 1 Bond, 442. There should be a prayer for general relief, and under it other relief consistent with the case made out may be granted. *English v. Foxall*, 2 Peters,



595; *Walden v. Bodley*, 14 Peters, 156; *Hobson v. McArthur*, 16 Peters, 182. Under such prayer damages may be allowed (*Penhallow v. Doane*, 3 Dall. 86) or specific performance ordered (*Taylor v. Merchants' F. I. Co.* 9 How. 490); but relief entirely inconsistent with that prayed for will not be granted. *Wilson v. Graham*, 4 Wash. C. C. 53. Though not entitled to relief prayed for, other relief may be granted under the general prayer. *Moore v. Mitchell*, 2 Woods, 483. The writ of *ne exeat* pending the suit must be specially prayed for. *Lewis v. Shainwald*, 7 Sawy. 403.

### RULE 22.

**Parties out of jurisdiction.** — If any person, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

**Absence of necessary parties.** — Where necessary parties are out of the jurisdiction it should so appear on the pleadings. *Tobin v. Walkinshaw*, 1 McAll. 26.

### RULE 23.

**Prayer for process.** — The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

### RULE 24.

**Signature of counsel.** — Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirm-

ation on his part that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

**Signature of counsel.** — Unless signed by counsel, the bill is demurrable. But signing on the back is sufficient. *Dwight v. Humphrey*, 3 McLean, 104. Signing as “solicitor” is sufficient, and as proper as signing “of counsel.” *Stinson v. Hil-drup*, 8 Biss. 376. Being ordered off the files, the bill may be signed, and on motion restored. *Roach v. Hulings*, 5 Cranch C. C. 637.

### RULE 25.

**Taxable costs.** — In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

### SCANDAL AND IMPERTINENCE IN BILLS.

#### RULE 23.

**Surplusage.** — Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred to a master by any judge of the court for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

**Impertinence.** — Impertinences are matters not pertinent or relevant to the points properly before the court for decision (*Wood v. Mann*, 1 Sum. 578), or such matters as are stated with needless prolixity. *Chapman v. School District*, Deady, 108.

Matter which is entirely immaterial is impertinent, and should be expunged. *Langdon v. Goddard*, 3 Story, 13. Where exceptions are taken for impertinence, the pleading will be given a liberal construction. *Griswold v. Hill*, 1 Paine, 390.

### RULE 27.

**Exceptions, how taken.**—No order shall be made by any judge for referring any bill, answer, or pleading, or other matter, or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

**Allowance of exception.**—An exception taken for impertinence must be allowed in whole or not at all. *Chapman v. School District*, Deady, 108.

### AMENDMENT OF BILLS.

#### RULE 28.

**As of course.**—The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill in any matter whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filing blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof free of expense, with suitable references to the places where the same are to be

inserted. And if the amendments are numerous, he shall furnish in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

**Amendments of bills.** — Amendments are only allowed where the bill is defective in parties, the prayer, or in omission of some fact connected with the substance of the case. *Shields v. Barrow*, 17 How. 130. To insert a wholly different case is not properly an amendment. *Shields v. Barrow*, 17 How. 130; *Goodyear v. Bourn*, 3 Blatchf. 266. Certain amendments will be permitted at any stage of the case, as to bring in an essential party (*Walden v. Bodley*, 14 Peters, 156; *Shields v. Barrow*, 17 How. 130; *Harrison v. Rowan*, 4 Wash. 202), or to aver citizenship (*Fisher v. Rutherford*, Bald. 188; *Hilliard v. Brevoort*, 4 McLean, 25); but amendments which change the character of the bill should rarely be admitted after the case is set for hearing. *Walden v. Bodley*, 14 Peters, 156. New matter which accrued since filing original bill cannot be introduced by amendment, but only by supplemental bill. *Copen v. Flesher*, 1 Bond, 440; *Swatzel v. Arnold*, Woolw. 383. Amending a bill on which an injunction was granted does not usually affect the injunction. *Read v. Consequa*, 4 Wash. C. C. 175. Process need not be issued on an amended bill against defendants who are in court, and therefore have notice. *Longworth v. Taylor*, 1 McLean, 514. Proper procedure is to file an amended bill, and not to interline original bill. *Pierce v. West*, 3 Wash. C. C. 355. Such amended bill should state no more of the original bill than may be necessary to make intelligible the amendments. *Pierce v. West*, 3 Wash. C. C. 355.

### RULE 29.

**By order of court.** — After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that

the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

**Amendment after answer.**—Matter which could not sooner have been introduced may be allowed by amendment after replication (*Wharton v. Lowrey*, 2 Dall. 364); but where it could have been done sooner, even in small matters, the amendment will not be allowed. *Ross v. Carpenter*, 6 McLean, 832; *Clifford v. Coleman*, 13 Blatchf. 210. If after replication amended bill be filed without leave, it will on motion be stricken from the files. *Washington R. R. Co. v. Brasley*, 10 Wall. 299. Where demurrer to bill is sustained, if justice require it this court may allow an amendment (*Hunt v. Rousmaniere's Admr.* 2 Mason, 342); but where a case has been dismissed for want of jurisdiction the bill cannot be amended nor cause restored. *Jackson v. Ashton*, 10 Peters, 480. This court has power, even after hearing, where a cause for relief is made out, but not that shown in the bill to allow amendments so as to do substantial justice. *Neale v. Neales*, 9 Wall. 1; *The Tremolo Patent*, 23 Wall. 518; *Battle v. Mutual L. I. Co.* 10 Blatchf. 418. Amendments regularly made cannot be avoided by a motion to set them aside. *Lichtenauer v. Cheney*, 3 McCrary, 119.

### RULE 30.

**Order, when abandoned.**—If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

## DEMURRERS AND PLEAS.

### RULE 31.

**When allowed.**—No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and if a plea, that it is true in point of fact.

**Certificate of counsel, affidavit, etc.** — Where pleas are not accompanied by the proper certificate and affidavit, they should be disregarded (*National Bank v. Insurance Co.* 14 Otto, 55. 76; *Secor v. Singleton*, 3 McCrary, 692; *Filer v. Levy*, 17 Fed. Rep. 610); but if plaintiff instead of disregarding it demur to it, he waives the certificate and affidavit. *Goodyear v. Toby*, 6 Blatchf. 130.

### RULE 32.

**With leave of court.** — The defendant may, at any time before the bill is taken for confessed, or afterwards with the leave of the court demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

**Allowance of.** — Defendant may meet plaintiff's bill either by demurrer, plea, or answer (*Livingston v. Story*, 9 Peters, 632), at any time before the bill is taken for confessed (*Oliver v. Decatur*, 4 Cranch C. C. 458. A demurrer to the whole bill must be overruled if any part of it is sufficient. *Atwill v. Ferrett*, 2 Blatchf. 39; *Heath v. Erie R. R. Co.* 8 Blatchf. 348; *Brandon Co. v. Prime*, 14 Blatchf. 371; *Perry v. Littlefield*, 17 Blatchf. 273; *Livingston v. Story*, 9 Peters, 632. A demurrer in part followed by an answer to rest is proper and allowable. *Pierpont v. Fowle*, 2 Wood. & M. 23; *Crescent City Co. v. Butchers' etc. Co.* 12 Fed. Rep. 225. Where the demurrer or plea and answer is to the same matter, defendant may be compelled to elect by which he will abide. *Hayes v. Dayton*, 13 Blatchf. 420. A demurrer that the plea is defective in not responding to all allegation in the bill is not good, for a plea may be to the whole bill or to part only (*Beard v. Bowler*, 2 Bond, 13); a plea may also be good in part and bad in part. *Wythe v. Palmer*, 8 Sawy. 412; *Kirkpatrick v. White*, 4 Wash. C. C. 595. Defendant cannot as a matter of right file more than one plea (*Wheeler v. McCormick*, 8 Blatchf. 267; *Lamb v. Starr*, Deady, 351), but when justice or necessity require it, court may allow several pleas. *Noyes v. Willard*, 1 Woods, 187. Where several pleas are filed without leave, defendant must elect by which he will stand. *Noyes v. Willard*, 1 Woods, 187. Fraud alleged in the bill must be denied as well where a plea is entered as when an answer is filed. *Lewis v. Baird*, 3 McLean,

56; *Burnley v. Jeffersonville*, 3 McLean, 336; *Shelton v. Tiffin*, 6 How. 163; *House v. Mullen*, 22 Wall. 42.

### RULE 33.

**Argument on plea.** — The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

**Plea, argument on — Replication to.** — If plea is in proper form, plaintiff should either set it down for argument or reply, and take issue on it. *Rhode Island v. Massachusetts*, 14 Peters, 210. Where, without reply, plaintiff set down the plea for argument, all the facts well pleaded are considered as admitted (*Mellus v. Thompson*, 1 Cliff. 125; *Parton v. Prang*, 3 Cliff. 537; S. C. 2 Off. Pat. Gaz. 619; *Gallagher v. Roberts*, 1 Wash. C. C. 320); plaintiff merely denying their legal sufficiency to prevent a recovery. *Rhode Island v. Massachusetts*, 14 Peters, 210. If plaintiff instead of setting down plea for argument reply and take issue on it, he admits its sufficiency as a defense, if the facts it alleges shall be established (*Myers v. Dorr*, 13 Blatchf. 23), and if the facts are proven the dismissal of the bill is simply a matter of course. *Gernon v. Boccaline*, 2 Wash. C. C. 199.

### RULE 34.

**Costs on demurrer overruled.** — If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

**Demurrer overruled.** — On overruling of demurrer or plea, defendant may answer as a matter of right. *Sims v. Lyle*, 4

Wash. C. C. 303; *Wooster v. Blake*, 7 Fed. Rep. 816. In such cases before a bill can be taken for confessed, the defendant must have been ruled to answer. *Halderman v. Halderman*, Hemp. 407. Where some of defendants fail to answer, the bill as to them may be taken as confessed. *Suydam v. Beals*, 4 McLean, 12. If the decree is taken *pro confesso* before the time given to answer has expired, it will be set aside on motion. *Fellows v. Hall*, 3 McLean, 487.

### RULE 35.

**Costs on demurrer allowed.**—If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

**Demurrer allowed.**—Costs are allowed in the discretion of the court. *Brooks v. Lyam*, 2 Story, 553. Plaintiff is not entitled as a matter of right to amend his bill after a demurrer thereto is sustained (*National Bank v. Carpenter*, 11 Otto, 567; *Hunt v. Rousmaniere's Admr.* 2 Mason, 342); but the court may in its discretion grant him leave to amend on reasonable terms. *Hunt v. Rousmaniere's Admr.* 2 Mason, 342; *Dwight v. Humphreys*, 3 McLean, 104; *Ketchum v. Driggs*, 6 McLean, 14. Amendments thus allowed do not affect the jurisdiction, but relate back to and become part of the original bill. *Gaylor v. R. R. Co.* 6 Biss. 286. An order refusing leave to thus amend cannot be reviewed in the supreme court. *National Bank v. Carpenter*, 11 Otto, 567.

### RULE 36.

**Demurrer, sufficiency of.**—No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

### RULE 37.

**Demurrer and answer to same matter.**—No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

**Effect of.**—Where the same matter is covered both by answer and by plea the plea will stand in the place of the



answer and overrule it. *Lewis v. Baird*, 3 McLean, 56; *Ferguson v. O'Hara*, 1 Peters C. C. 493. Defendant cannot demur, plead, and answer to the whole bill at the same time. *Crescent City Co. v. Butchers' etc. Co.* 12 Fed. Rep. 225. Where the answer is broader than the plea the latter is overruled. *Lewis v. Baird*, 3 McLean, 56. The proper course in these cases is a motion to strike out, or to compel defendant to elect between an answer, demurrer, and plea. *Hayes v. Dayton*, 18 Blatchf. 420. But if plaintiff go to trial on plea or demurrer, he cannot object on the argument that the answer is a waiver of demurrer or plea. *Hayes v. Dayton*, 18 Blatchf. 420.

### RULE 38.

**Admission by failure to reply.**—If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

**Dismissal on failure to reply.**—Where a plea exists which has not been replied to or set down for hearing before the second term after filing, cause will be dismissed. *Poultney v. Lafayette*, 3 How. 81; *Parton v. Prang*, 3 Cliff. 537; S. C. 2 Off. Pat. Gaz. 619. A replication to a plea admits its sufficiency as much as if set down for argument and allowed. *Hughes v. Blake*, 6 Wheat. 453. If instead of filing replication plaintiff set down cause for hearing, this admits the truth of everything well pleaded. *Parton v. Prang*, 3 Cliff. 537; *Leeds v. Marine Ins. Co.* 2 Wheat. 380. But a bill will not be dismissed unless the party had proper notice under rule 4 of filing pleas or demurrers. *Newby v. Oregon C. R. R. Co.* 1 Sawy. 63. If plea or demurrer is insufficient under rule 31 in not having proper certificate and affidavit, failure to act on it is no ground for dismissal. *National Bank v. Insurance Co.* 14 Otto, 54.

### ANSWERS.

#### RULE 39.

**Sufficiency of.**—The rule, that if the defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall

be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser for a valuable consideration, without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

**Extent and sufficiency of.** — If by answer defendant set up a bar, he need not answer further, and his failure to answer is no ground of exception (*Gaines v. Agnelly*, 1 Woods, 238), as where bar of Statute of Limitations is set up. *Sample v. The Bank*, 1 Woods, 523. But pleas to the jurisdiction do not excuse further answer. They cannot be taken advantage of by general answer (*Livingston v. Story*, 11 Peters, 352); but must be taken by special plea. *Wickliffe v. Owings*, 17 How. 47; *Wood v. Mann*, 1 Sum. 578. Where the answer admits the facts, but sets up matter by way of avoidance, plaintiff need not prove the facts, but defendant must prove such matter in avoidance. *Clarke v. White*, 12 Peters, 178; *Randall v. Phillips*, 3 Mason, 378. All the facts called in question must be responded to by answer, and not by plea. *Bailey v. Wright*, 2 Bond, 181. Defendant's answer, if uncontradicted by any witness, is conclusive evidence in his favor. *Lenox v. Prout*, 3 Wheat. 520; *Union Bank v. Geary*, 5 Peters, 98; *Higbe v. Hopkins*, 1 Wash. C. C. 230; *Carpenter v. Prov. W. I. Co.* 4 How. 185; *Hughes v. Blake*, 1 Mason, 515; *Langdon v. Goddard*, 2 Story, 267; *Gould v. Gould*, 3 Story, 516; *Greeley v. Smith*, 3 Story, 659. It must be impugned by more than the testimony of one witness. *Towne v. Smith*, 1 Wood. & M. 115; *Delano v. Winsor*, 1 Cliff. 501; *Pomeroy v. Manin*, 2 Paine, 476. Complainant must have at least two witnesses, or one witness and corroborative circumstances, or he is not entitled to relief. *Toby v. Leonard*, 2 Cliff. 40; *Gilman v. Libbey*, 4 Cliff. 447; *Hayward v. National Bank*, 2 Cliff. 294; *Gernor v. Bocaline*, 2 Wash. C. C. 199; *Walker v. Derby*, 5 Biss. 134. Where the answer relies on new matter defendant must prove

it; the answer is not evidence to support it. *Randall v. Phillips*, 3 Mason, 378. Defendant cannot make out one case in the answer and another on the proof; the allegata and probata must agree. *Boone v. Chiles*, 10 Peters, 177. The answer of a defendant is not evidence against a co-defendant (*Field v. Holland*, 6 Cranch, 8; *Russell v. Clark*, 7 Cranch, 69; *Clarke's Ex. v. Van Reimsdyk*, 9 Cranch, 153; *Leeds v. Marine Ins. Co.* 2 Wheat. 380; *Morris v. Nixon*, 1 How. 119); except where the defendants are partners (*Van Reimsdyk v. Kane*, 1 Gall. 630); or defendants are privies in estate. *Osborne v. U. S. Bank*, 9 Wheat. 738.

#### RULE 40.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

*Ordered*, that the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

Amended December Term, 1850, as in second paragraph, 10 How. v.

**Requisites and forms of interrogatories prior to amendment.**—See *Young v. Grundy*, 3 Cranch, 51; *Treadwell v. Cleveland*, 3 McLean, 233; *Langdon v. Goddard*, 3 Story, 13; *Parsons v. Cumming*, 1 Woods, 461. Where complainant desires to obtain a discovery he must propound the interrogatories according to the rules. *Bailey v. Young*, 12 Blatchf. 200.

#### RULE 41.

**Interrogatories to be numbered.**—The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each

defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

**Answer, when not evidence.**—If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section three of the act of Congress of July 2, 1864.

Second paragraph added by amendment, May 6, 1872, 13 Wall. xi; see Revised Statutes, § 858, ante.

**Verification of answer, waiving of.**—Where plaintiff does not waive the oath to the answer he is bound to produce two witnesses or one and circumstances corroborating him, to overthrow it (*Slessinger v. Buckingham*, 8 Sawy. 469); but if plaintiff waive the oath the answer is not evidence. *Patterson v. Gaines*, 6 How. 550. But a waiver by bill of an oath to the answer amounts to nothing unless accepted by respondents (*Amory v. Lawrence*, 3 Cliff. 524; *Holbrook v. Black*, 8 L. R. N. S. 89); and if not accepted defendant is bound to answer on oath. *Heath v. Erie R. R. Co.* 8 Blatchf. 348.

## RULE 42.

**Specified interrogatories part of the bill.**—The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after

the bill is filed, shall be considered and treated as an amendment of the bill.

### **RULE 43.**

**From preceding interrogating part.**—Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words “to the end thereof,” there shall hereafter be used words in the form or to the effect following: “To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrances, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say,—

“1. Whether, etc.

“2. Whether, etc.”

**Answer to interrogatories.**—Where the answer to interrogatories is evasive defendant will be ordered to make a full disclosure and to pay the costs of the hearing. *Langdon v. Goddard*, 3 Story, 13.

### **RULE 44.**

**What interrogatories need not be answered.**—A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

### **RULE 45.**

**Special replication.**—No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same, with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

**Not permissible.**—A special replication is not permitted. Matter formerly so pleaded must be set up by bill or amendment (Taylor v. Benham, 5 How. 283), as matter in response to allegations in the answer. Taylor v. Benham, 5 How. 233. New matter must be set out by amendment to the bill. Wilson v. Stolly, 4 McLean, 275; Coleman v. Martin, 6 Blatchf. 291. If a special replication is filed pleading new matter, such matter will be considered surplusage at the hearing. Dupont v. Massy, 4 Wash. C. C. 128. All amendments under this rule should be with leave of the court (Clements v. Moore, 6 Wall. 299); but if filed without leave and not objected to, objection is waived. Clements v. Moore, 6 Wall. 299.

### RULE 46.

**New or supplemental answer.**—In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court, and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

## PARTIES TO BILLS.

### RULE 47.

**Proper, when not necessary parties.**—In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

**Parties, proper, necessary and indispensable.**—The general rule is that all persons interested should be made parties plaintiff or defendant, in order that a compl to decree may be made (Caldwell v. Taggart, 4 Peters, 190; Morgan v. Morgan, 2 Wheat. 293; Williams v. Bankhead, 19 Wall. 263; Van Reimsdyk v. Kane, 1 Gall. 371), however numerous they may be.

*West v. Randall*, 2 Mason, 181. This rule does not affect the jurisdiction but is discretionary, and may be modified according to circumstances. *Elmendorf v. Taylor*, 10 Wheat. 152. No person not made a party to the suit is bound by the decree. *Finley v. Bank of U. S.* 11 Wheat. 304. Nor is a decree authorized by Congress, or this court, in absence of a party whose rights may be affected by it. *Coiron v. Millandon*, 19 How. 113. Where no relief is sought against persons connected with the subject of the suit they should not be made parties defendant. *French v. Shoemaker*, 14 Wall. 314; *Fitch v. Creighton*, 24 How. 159; *Heath v. Erie Railway Co.* 8 Blatchf. 347; *Van Reimsdyk v. Kane*, 1 Gall. 371. Where parties are merely formal or only necessary parties, and are out of the jurisdiction of the court they will be dispensed with. *Abbott v. American H. R. Co.* 4 Blatchf. 401; *Elmendorf v. Taylor*, 10 Wheat. 152; *Mallow v. Hinde*, 12 Wheat. 193; *Vattier v. Hinde*, 7 Peters, 252; *McCoy v. Rhodes*, 11 How. 131. Where all the parties are not before the court and some are out of the jurisdiction, if a decree can be made without prejudice to their interests, this may be done. (*Cameron v. M'Roberts*, 3 Wheat. 591; *Harding v. Handy*, 11 Wheat. 103; *Gray v. Larrimore*, 2 Abb. U. S. 542; *Cole S. M. Co. v. Virginia & C. Co.* 1 Sawy. 470; *Payne v. Hook*, 7 Wall. 425); to make such a decree is discretionary with the court. *Merchants' Bank v. Seton*, 1 Peters, 299. This rule specially reserves the rights of absent parties. *Calhoun v. St. Louis & Co.* 14 Fed. Rep. 4. The joinder or non-joinder of merely formal parties does not oust the jurisdiction of this court. *Wormley v. Wormley*, 8 Wheat. 421; *Carneal v. Banks*, 10 Wheat. 181; *Ward v. Arredondo*, 1 Paine, 410. Court will dispense with joinder of those whose citizenship would oust the court if it can decide properly without them. *Harrison v. Urann*, 1 Story, 64; *Joy v. Wirtz*, 1 Wash. C. C. 517; *Drake v. Goodridge*, 6 Blatchf. 151. Where parties are indispensable to a decree, though out of the jurisdiction, the court will not proceed without them, and will dismiss the bill. *Riddle v. Mandeville*, 5 Cranch, 323; *Russell v. Clarke*, 7 Cranch, 64; *Marshall v. Beverly*, 5 Wheat. 313; *Connecticut v. Pennsylvania*, 5 Wheat. 424; *Barney v. Baltimore*, 6 Wall. 230; *Bank v. Carrollton R. R.* 11 Wall. 624; *Traders' Bank v. Campbell*, 14 Wall. 87; *Ribon v. R. R. Co.* 16 Wall. 446; *Young v. Cushing*, 4 Biss. 456; *Abbott v. American H. R. Co.* 4 Blatchf. 491; *Bunce v. Gallagher*, 5 Blatchf. 481; *Florence S. M. Co. v. Singer S. M. Co.* 8 Blatchf. 113; *Carson v. Robertson*, Chase, 475; *West v. Randall*, 2 Mason, 181; *Bank v. Smith*, 6 Fed. Rep. 215; *Dormitzer v. Ill. etc. B. Co.* 6 Fed. Rep. 217. The want of proper parties is not, of itself, sufficient ground for dismissing bill (*Milligan v. Milledge*, 3 Cranch, 220; *Hoxie v. Carr*, 1 Sum. 173); but the court will grant leave to make new parties, and if

the parties cannot then be brought in the bill will be dismissed. *Hunt v. Wycliffe*, 2 Peters, 201; *Dandridge v. Washington's Exrs.* 2 Peters, 370; *Bank v. Carrolton R. R.* 11 Wall. 624. Those whose interests are in harmony should be joined as plaintiffs or defendants as the case may be. *Bunce v. Gallagher*, 5 Blatchf. 481; *Parsons v. Lyman*, 4 Blatchf. 432. Where the jurisdiction of the court would be ousted by making a person party plaintiff he may be made party defendant, and equally have benefit of the suit. *Brown v. Pac. M. S. S. Co.* 5 Blatchf. 526. Incompetent persons should be made parties, by guardian or committee. *Harrison v. Brown*, 4 Wash. C. C. 202. A jurisdiction depending on condition of parties is governed by that condition as at commencement of suit (*Connolly v. Taylor*, 2 Peters, 556), and is not ousted by subsequent change of condition. *Mollan v. Torrance*, 9 Wheat. 537.

### RULE 48.

**Parties too numerous.**—Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

**Parties too numerous.**—The court will dispense with the necessity of bringing all parties before it, where they are too numerous or many of them unknown (*Mandeville v. Riggs*, 2 Peters, 482; *Brown v. Pac. M. S. S. Co.* 5 Blatchf. 525; *Campbell v. R. R. Co.* 1 Woods, 358; *Wilmer v. Atlanta etc. Co.* 2 Woods, 417), or where the question is one of general interest, and a few fine for all. *West v. Randall*, 2 Mason, 181. This rule specially reserves the rights of absent parties, as the decree does not bind them. *Calhoun v. St. Louis Ry. Co.* 14 Fed. Rep. 4.

### RULE 49.

**Trustees, etc., as parties.**—In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate,



for the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

**Application of rule.**—It is only where the fee is actually vested in the executor or trustee that the rule applies. *Chew v. Hyman*, 10 Biss. 240.

### **RULE 50.**

**Heir-at-law, when a necessary party.**—In suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party where he desires to have the will established against him.

### **RULE 51.**

**Joint debtors.**—In all cases in which the plaintiff has a joint and several demand against several persons, either as principles or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

### **RULE 52.**

**Defect of parties suggested in answer.**—Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following, that is to say: "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his

cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

**Defect for want of parties.**—Before a bill can be dismissed for defect of parties, the objection must have been taken by demurrer, plea, or answer. *Greenleaf v. Queen*, 1 Peters, 138; *U. S. v. Gillespie*, 6 Fed. Rep. 803. The objection should specify names, description, and necessity of such parties. *Legee v. Thomas*, 7 Blatchf. 11. Where the objection is sustained the court will order all proper parties to be made. *Harrison v. Rowan*, 4 Wash. C. C. 202.

### RULE 53.

**Defect of parties suggested at hearing.**—If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

**Defect of parties at hearing.**—It is generally too late to first take the objection of want of parties at the hearing (*Legee v. Thomas*, 3 Blatchf. 11), and will not avail except in extreme cases (*Mechanics' Bank v. Seton*, 1 Peters, 299; *Story v. Livingston*, 13 Peters, 359), as where the court cannot proceed to a decree without prejudice to the rights of such absent parties. *Wallace v. Holmes*, 9 Blatchf. 65.

## NOMINAL PARTIES TO BILLS.

### RULE 54.

**When party need not appear.**—Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the

proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

**Nominal party need not appear.**—This court will not suffer its jurisdiction to be ousted by the joinder of a nominal party not entitled to sue or be sued, but will make a decree without prejudice to him. *Wormley v. Wormley*, 8 Wheat. 422.

### RULE 55.

**Injunction, when granted as of course.**—Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

**Injunctions generally.**—A bill to enjoin a judgment at law is not an original bill (*Simms v. Guthrie*, 9 Cranch, 19), and jurisdiction therefor does not depend on citizenship, unless new parties are made or new interests involved. *Dunn v. Clarke*, 8 Peters, 1. A federal court cannot enjoin proceedings in a State court (*McKinne v. Voorhies*, 7 Cranch, 279; *Dial v. Reynolds*, 3 Otto, 34; Revised Statutes, § 720, *ante*), nor can a State court enjoin a federal court. *Diggs v. Wolcott*, 4 Cranch, 179; *Haines v. Carpenter*, 1 Otto, 254; *City Bank v. Skelton*, 2 Blatchf. 26. An injunction will not be granted if the rights of third persons are concerned, unless they can be made parties. *Whepley v. Erie Ry. Co.* 2 Blatchf. 271. An injunction will not be granted pending a plea to the jurisdiction (*Ewing v. Blight*, 3 Wall. Jr. 139); but to prevent mischief an immediate hearing of the plea will be ordered (*Ewing v. Blight*, 3 Wall. Jr. 139); or if this cannot be done, court will order that defendants do nothing prejudicial to plaintiff's interests pend-

ing hearing of motion for injunction. *Fanshawe v. Tracy*, 4 Biss. 490; *Fremont v. Merced Mg. Co.* 1 McAll. 268. The court, on the other hand, will not allow the plaintiff to fix the time so far ahead as to embarrass defendant, but will anticipate the rule day. *Walworth v. Board of Supervisors*, 5 Biss. 133. A mandatory injunction will be granted only on final hearing, and then only to execute the decree. *McCanley v. Kellogg*, 2 Woods, 13. Notice of application for injunction is waived by appearance (*Marsh v. Bennett*, 5 McLean, 117); but no injunction can be granted except on reasonable notice. *Mowrey v. R. R. Co.* 4 Biss. 78. An injunction allowed in vacation expires at commencement of next term. *Gray v. Chicago etc. Co.* 1 Woolw. 63. A provisional injunction, granted on the filing of a bill, falls with dismissal of the bill. *Coleman v. Hudson R. R. Co.* 5 Blatchf. 57. Where an injunction to stay proceedings at law is granted without answer, it will not be dissolved until answer is filed (*Read v. Consequa*, 4 Wash. C. C. 174), and the motion to dissolve will be considered only on the questions raised in the answer. *Farmer v. Calvert Lith. Co.* 1 Flippin, 228. The dissolution of an injunction which may do irreparable injury rests in discretion of the court, either before answer or after. *Poor v. Carleton*, 3 Sum. 70.

## **BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.**

### **RULE 56.**

**Bill of revivor, when proper.**—Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

**Abatement and revivor.**—Wherever a suit shall abate by reason of death or absence of a party or other event, a bill of revivor is necessary to reopen the proceedings (*Kentucky v.*

Georgia St. Bk. 8 How. 526), and the party may have it as a matter of right. *Fitzpatrick v. Domingo*, 14 Fed. Rep. 216. It is not the commencement of a new suit, but merely the continuance of the old one. *Fitzpatrick v. Domingo*, 14 Fed. Rep. 215; *Clarke v. Mathewson*, 12 Peters, 164. Though the original parties were citizens of different States, the suit cannot be revived where the new parties would be citizens of the same State. *Clarke v. Matthews*, 2 Sum. 262. Where proceedings are revived, the practice is to admit all testimony which might have been used before abatement. *Vattier v. Hinde*, 7 Peters, 252.

### RULE 57.

**Supplemental bill, when proper.**—Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason, a supplemental bill or a bill in the nature of a supplemental bill may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by the judge of the court.

**Allowance of.**—Matters happening after the filing of the bill should be supplied by supplemental bill (*Kennedy v. Georgia St. Bk.* 8 How. 610), as where there has been a change of interest *pendente lite* (*Hoxie v. Carr*, 1 Sum. 173; *Tappan v. Smith*, 5 Liss. 73), or to introduce matter which accrued subsequent to filing original bill (*Jenkins v. Eldredge*, 3 Story, 299; *Copen v. Flesher*, 1 Bond, 440), or matter of which plaintiff had no information at time of filing bill. *Caster v. Wood*, 1 Bald. 289. The averments themselves need not be embraced in the petition for leave to file them, but only the ground for so doing. *Parkhurst v. Kinsman*, 2 Blatchf. 72. Plaintiff will not be allowed by way of supplemental bill to file matter which will change the character of the suit. *Snead v. McCoull*, 12 How. 407.

### RULE 58.

**What need not be set forth.**—It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the

statements in the original suit, unless the special circumstances of the case may require it.

## **ANSWERS.**

### **RULE 59.**

**Verification, before whom.** — Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory

**Answer from beyond the sea.** — An answer in chancery from beyond the sea must be taken by a commissioner under a *dedimus* issued by this court. *Road v. Consequa*, 4 Wash. C. C. 335; *Herman v. Herman*, 4 Wash. C. C. 555.

## **AMENDMENT OF ANSWERS.**

### **RULE 60.**

**Wherein amendable.** — After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank or correcting a date, or reference to a document or other small matter, and be resworn at any time before a replication is put in or the cause is set down for a hearing upon bill and answer. But after replication or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements except by special leave of the court or of a judge thereof, upon motion and cause shown after due notice to the adverse party supported, if required, by affidavit. And in every case where leave is so granted, the court or the judge granting the same may in his discretion require that the same be separately engrossed and added as a distinct amendment to the original answer so as to be distinguishable therefrom.

**When allowed.** — The allowance of amendments to answers is in the discretion of the court (*Caster v. Wood*, 1 Bald. 289), and that discretion will be exercised to forward justice and restrain gross and inexcusable neglect. *Calloway v. Dobson*, 1 Brock. 119. In certain cases amendments are allowed at any

stage of the proceedings (*Rhode Island v. Massachusetts*, 13 Peters, 23), such as mistakes of dates, matters of form, and verbal inaccuracies. *Smith v. Babcock*, 3 Sum. 533. Amendments which change the character of the answer will rarely be admitted after hearing. *Walden v. Bradley*, 14 Peters, 156. Where the proposed amendment could with diligence have been sooner introduced, it will not be allowed (*India Rub. Co. v. Phelps*, 8 Blatchf. 85), but where omitted through mistake it will usually be allowed. *Suydam v. Truesdale*, 6 McLean, 450. If the amendment contain the same matter and defence as the original answer it is impertinent. *Grier v. Gregg*, 4 McLean, 202.

### EXCEPTIONS TO ANSWERS.

#### RULE 61.

**When to be taken.** — After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

**Exceptions for impertinence and insufficiency.** — An exception that allegations which support the equity of the bill are neither answered, admitted, or denied, is good, and will be sustained. *Hardeman v. Harris*, 7 How. 726; *Read v. Consequa*, 4 Wash. C. C. 335. A denial on information and belief of any of the facts in the bill, is a good ground of exception. *Bradford v. Geiss*, 4 Wash. C. C. 513. An Exception for impertinence is only allowed where apparent that the matter is not material or relevant. *Chapman v. School District*, Deady, 108. If after cancelling impertinent matter, the answer is insufficient, an exception taken therefor may be allowed. *Patriotic Bank v. Washington Bank*, 5 Cranch C. C. 602. An exception for insufficiency should state the charges in the bill, and answer thereto, verbatim, that the court may properly judge it, *Brooks v. Byam*, 1 Story, 296. The answer when excepted to, will be liberally construed, having regard to the case made by the bill. *Griswold v. Hill*, 1 Paine, 390. An exception to the answer is waived by going to trial on the merits. *Kitredge v. Race*, 92 U. S. 116.

#### RULE 62.

**Separate answers, costs on.** — When the same solicitor is

employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

### RULE 63.

**When to be set down for hearing.** — Where exceptions shall be filed to the answer for insufficiency within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter before a judge of the court, and shall enter, as of course, in the order book, an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answers shall be deemed sufficient; *provided, however*, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

**Exceptions, setting down for hearing.** — Exceptions should be set down for hearing on a rule day before the judge. *La Vega v. Lapsley*, 1 Woods, 428. A reference before that time or to a master is a nullity and abandonment of the exception. *La Vega v. Lapsley*, 1 Woods, 428. Plaintiff may withdraw his exception and rejoin forthwith. *Penn v. Butler*, Wall. C. C. 4.

### RULE 64.

**Answer on allowance of exceptions.** — If at the hearing the exceptions shall be allowed the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant,



when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

#### **RULE 65.**

**Exceptions overruled costs.** — If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

### **REPLICATION AND ISSUE.**

#### **RULE 66.**

**When to be filed.** — Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

**Replication, when allowed, etc.** — The answer of every defendant must be replied to without reference to the state of the cause or of the pleadings in regard to any other defendant. *Coleman v. Martin*, 6 Blatchf. 291. Though a replication should be filed before cause is set down the court may allow plaintiff to file it afterwards. *Coleman v. Martin*, 6 Blatchf. 291. But it is too late after hearing to apply for leave to file it. *Bullinger v. Mackey*, 14 Blatchf. 355; *Fischer v. Wilson*, 16 Blatchf. 220. And the court will proceed to try the case on its merits, or allow one to be filed *instanter* when not on file at

time of hearing. *Jones v. Brittan*, 1 Woods, 667. Where replication is not filed the order dismissing the bill is of course (*Robinson v. Satterlee*, 3 Sawy. 134); but the judge may allow the replication to be filed *non pro tunc*, and impose such terms as may be proper. *Washington R. R. v. Bradleys*, 10 Wall. 302; *Fischer v. Hayes*, 19 Blatchf. 26, 8, C. 6 Fed. Rep. 76. If filed without leave, after time prescribed, the court may allow the replication to stand. *Fischer v. Hayes*, 19 Blatchf. 26. The objection that proper replication has not been filed cannot be taken for the first time in the Supreme Court. *Clements v. Moore*, 6 Wall. 299. A direct departure in the replication from the statements of the bill will not be permitted. *Vattier v. Hinde*, 19 Wall. 646. Special replications are disused, and new matter must be introduced by supplemental bill. *Dupont v. Mussey*, 4 Wall. 123. If introduced it will be treated as surplusage. *Dupont v. Mussey*, 4 Wall. 123; *Warren v. Van Brunt*, 19 Wall. 646. When a motion to strike the answer from the file is pending, the suit will not be dismissed for want of replication. *Allis v. Store*, 10 Biss. 57; S. C. 5 Fed. Rep. 203.

### TESTIMONY—HOW TAKEN

#### RULE 67.

**Commissions, when taken out.**—After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*.

**Who to name commissioners.**—In all cases the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories. Ordered, that the sixty-seventh rule be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or in vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that

the court or judge thereof can now do by the said sixty-seventh rule.

**Notice required.** — Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination, and re-examination, and which shall be conducted, as near as may be, in the mode now used in common-law courts. The depositions taken upon such oral examination shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances; and when completed shall be read over to the witness, and signed by him in the presence of the parties or counsel, or such of them as may attend; *provided*, if the witness shall refuse to sign the said deposition then the examiner shall sign the same; and the examiner may upon all examinations state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

**Compulsory attendance of witnesses.** — In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

**Notice of time and place.** — Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for

such reasonable time as the examiner may fix by order in each cause.

**Transmission of deposition.**—When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record in the same mode as prescribed in the thirtieth section of the act of Congress, September 24, 1789.

**Testimony, how taken.**—Testimony may be taken on commission in the usual way by written interrogatories, and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

**Court may assign the time.**—Where the evidence to be adduced in a cause is to be taken orally, as provided in the order passed at the December Term, 1861, amending the sixty-seventh general rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause unless by agreement of the parties, or by leave of court first obtained on motion for cause shown.

Amendments promulgated December Term, 1854, 17 How. vii; December Term, 1861, 1 Black, vi; December Term, 1869, 9 Wall. vii. See Revised Statutes. '65.

**Taking o testimony.**—Any defendant whose answer is sufficient has a right to have the case as to him put at issue, and to proceed to take his testimony. *Coleman v. Martin*, 6 Blatchf. 291. The party may examine and cross-examine witnesses orally in open court (*Sickles v. Gloucester Co.* 3 Wall. Jr. 186; *Van Hook v. Pendleton*, 2 Blatchf. 85), or may take his testimony by commission. *Bronson v. La Crosse R. R. Co.* 9 Am. Law R. 350; *Bischoffsheim v. Baltzen*, 10 Fed. Rep. 1. The power still resides in the court to take testimony of witnesses in open court (*In re Clarke*, 9 Blatchf. 372), the passage of this rule merely providing that commissions may be taken. *Sickles v. Gloucester Co.* 3 Wall. Jr. 192. The court is authorized to appoint examiners to take testimony as well in as out of

its territorial jurisdiction. *N. C. R. R. Co. v. Drew*, 3 Woods, 692. The motion for appointment of commissioners to take testimony abroad is not grantable of course. *U. S. v. Parrott*, 1 McAll. 447. The authority of commissioners is special and must be strictly pursued (*Armstrong v. Brown*, 1 Wash. C. C. 43; *Menus v. Dupont*, 3 Wash. C. C. 31; *Willings v. Consequa*, 1 Peters, 301; *Lonsdale v. Brown*, 3 Wash. C. C. 404), and the commission must be executed in the place directed and none other. *Boudereau v. Montgomery*, 4 Wash. C. C. 186; *Rhoades v. Selin*, 4 Wash. C. C. 715. Depositions taken under commission cannot be read, unless proof is made that notice of rule therefor was properly served. *Rhoades v. Selin*, 4 Wash. C. C. 715. A deposition taken to be read in case of inability of witness to attend can only be read on proving such inability. *Read v. Bertrand*, 4 Wash. C. C. 558. Where parties cannot agree on interrogatories, they should be referred for settlement to a master, subject to review of the court before commission issues. *Crocker v. Franklin Co.* 1 Story, 169. Each interrogatory should be separately answered, and the omission of such answer is fatal to the whole commission. *Ketland v. Bissett*, 1 Wash. C. C. 144. All interrogatories must be substantially answered (*Dodge v. Israel*, 4 Wash. C. C. 323); and if the general interrogatory is not answered, it is fatal to the deposition. *Richardson v. Golden*, 3 Wash. C. C. 109; *Rhoades v. Selin*, 4 Wash. C. C. 715. If the interrogatories are hypothetical, or to be asked in a certain event which does not happen, or refer to records which speak for themselves, they need not be answered. *Bell v. Davidson*, 3 Wash. C. C. 328. It is no objection that a material part of evidence comes in response to the general interrogatory. *Rhoades v. Selin*, 4 Wash. C. C. 715. A deposition in which only the direct interrogatories were put is fatally defective (*Gilpins v. Consequa*, 3 Wash. C. C. 184); but if no cross-interrogatories were filed the deposition, taken on the direct questions, may be admitted. *Gass v. Stinson*, 3 Sm. 98. It is no objection that direct and cross-interrogatories were answered at different times. *Gilpins v. Consequa*, 3 Wash. C. C. 184. The examiner is not compelled to file proofs taken until his fees are paid. *Frese v. Biedenfeld*, 14 Blatchf. 402. Where testimony is taken on commission the court will not, at the hearing, receive *viva voce* testimony except to prove an exhibit. *De Butts v. Bacon*, 1 Cranch C. C. 569.

### RULE 68.

**Testimony by deposition after issue.**—Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is

given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

Revised Statutes, §§ 863-875.

### RULE 69.

**Time allowed.** — Three months and no more shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But by consent of the parties publication of the testimony may at any time pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order books or indorsed upon the deposition or testimony.

Amended December Term, 1869, 9 Wall. vii.

**Time allowed for taking testimony.** — For the purposes of this rule the cause is not at issue until it is so as to all defendants, or to one or more and confessed as to the rest (*Gilbert v. Van Arman*, 1 Flipoin, 421), and unless so at issue the court will enlarge the time so that plaintiff may take proofs in respect to all defendants who plead. *Coleman v. Martin*, 6 Blatchf. 291. The three months allowed is for taking testimony of both plaintiff and defendant. *Ingle v. Jones*, 9 Wall. 486. Usually after publication of testimony no new witness can be examined or new evidence taken (*Wood v. Mann*, 2 Sum. 316), except in special cases on good cause shown, as surprise, accident, or fraud. *Wood v. Mann*, 2 Sum. 316. Exhibits may be proven after publication, and even at the hearing. *De Butts v. Bacon*, 1 Cranch C. C. 569. So also may the credibility of witnesses whose depositions are before the court be proven by witnesses at the hearing. *Gass v. Stinson*, 2 Sum. 605; *Wood v. Mann*, 2 Sum. 316. Proofs not in proper time may be filed *nunc pro*

*tunc* in the discretion of the court. *Fischer v. Hayes*, 19 Blatchf. 25; S. C. 6 Fed. Rep. 76.

## TESTIMONY DE BENE ESSE.

### RULE 70.

**When may be taken—Notice.**—After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners, as the judge of the court may direct, to take the examination of such witness or witnesses *de bene esse* upon giving due notice to the adverse party of the time and place of taking his testimony.

**Party as witness.**—This rule does not apply to the case of a party propounding himself as a witness. *Eslava v. Mazange's Admr.* 1 Woods, 624.

## FORM OF THE LAST INTERROGATORY.

### RULE 71.

**Written interrogatories.**—The last interrogatory in the written interrogatories to take testimony now commonly in use, shall in the future be altered, and stated in substance, thus: "Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

**General interrogatory.**—In answer to this question, any further knowledge witness may have material to the cause is admissible. *Rhoades v. Selin*, 4 Wash. C. C. 715. If there is no answer whatever to this interrogatory, the deposition is fatally defective. *Richardson v. Golden*, 3 Wash. C. C. 109; *Dodge v. Israel*, 4 Wash. C. C. 323.

**CROSS-BILL.****RULE 72.**

**Defendant to answer original bill.** — Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

**Cross-bill, allowance of.** — The filing of a cross-bill without leave is irregular and it may be set aside. *Bronson v. La Crosse* R. R. Co. 2 Wall. 283. A cross-bill is a mere auxiliary suit and must touch matters in question in the original bill. *Cross v. De Valle*, 1 Wall. 1. If it concern matter different from original bill, it is not a cross-bill. *Rubber Co. v. Goodyear*, 9 Wall. 807; *Heath v. Erie Ry. Co.* 9 Blatchf. 316; *Forbes v. R. R. Co.* 2 Woods, 323. Matter cannot be litigated between defendants, by way of a cross-bill, which is foreign to the original bill (*Putnam v. New Albany*, 4 Biss. 365), nor can cross-bill be used for settling any controversy between defendants, unless necessary to a complete decree on original bill. *Weaver v. Alter*, 3 Woods, 152. New parties cannot be brought into a cross-bill. *Sheils v. Barrow*, 17 How. 130. A cross-bill may be used to discover whether a party is the real or merely nominal plaintiff (*Young v. Pott*, 4 Wash. C. C. 521), or to establish a conveyance which original bill seeks to set aside. *Carnochan v. Christie*, 11 Wheat. 446. Where the court has jurisdiction it is no valid objection on a cross-bill that parties are citizens of the same State (*Peay v. Schenck*, 1 Woolw. 175), nor can the objection be taken that a State court had acquired prior jurisdiction. *Brandon etc. Manuf. Co. v. Prime*, 14 Blatchf. 371. The original cause will not be heard until cross-bill is answered. *Young v. Pott*, 4 Wash. 521. Where the cross-bill and answers are filed, a decree disposing of the whole case should settle the issues raised in them. *Moore v. Huntington*, 17 Wall. 417. If after filing cross-bill plaintiff dismiss original bill, defendant is entitled to decree *pro confesso* on the cross-bill. *Lowenstein v. Glidewell*, 5 Dill. 325.

**REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.****RULE 73.**

**Account of personal estate.** — Every decree for an account of



the personal estate of a testator or intestate shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

**Account, how taken.**—Where an account is necessary, the court usually ascertains the amounts by reference to a master. *Kelsey v. Hobby*, 16 Peters, 269. This is usually necessary where the bill is taken *pro confesso*. *Pendleton v. Evan's Exrs.* 4 Wash. C. C. 391. In cases of infringement, reference is usually ordered to ascertain loss and profits. *Allen v. Blunt*, 1 Blatchf. 480. A complex and intricate account is an unfit subject for examination in a court, and should be referred to a master. *St. Colombe v. U. S.* 7 Peters, 625. The court may itself ascertain the facts if enabled by the evidence to do so, and it will not then order a reference (*Field v. Holland*, 6 Cranch, 8; *Lawrence v. Dana*, 4 Cliff. 6), unless both parties desire a reference and acquiesce in the delay and expense thereof. *Jewett v. Cunard*, 3 Wood. & M. 277.

#### RULE 74.

**Reference, when to be laid before master.**—Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance and for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

#### RULE 75.

**Duty of master.**—Upon every such reference it shall be the duty of the master, as soon as he reasonably can, after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to

the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay.

#### RULE 76.

**Report, what need not contain.**—In the reports made by the master to the court no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.

#### RULE 77.

**Proceedings before master.**—The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition, according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

**Proceedings before master.**—The master is at liberty to ex-

amine any witness either on interrogatories or *viva voce*, or both (Foote v. Silsby, 3 Blatchf. 507), and for the same reason that a court may do so. Story v. Livingston, 13 Peters, 359. The master's conduct and report will be regarded as correct in the matter, unless specially excepted to. Harding v. Handy, 11 Wheat. 103.

### RULE 78.

**Witnesses, how summoned.** — Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or to give evidence, it shall be deemed a contempt of the court, which, being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

**Witness, examination, before master or in court.** — A refusal to produce books or papers on master's order is a contempt and punishable as such. Erie Ry. Co. v. Heath, 8 Blatchf. 413. This rule does not change the practice, and generally oral examination on the trial will not be admitted. R. R. Co. v. Drew, 3 Woods, 692. But witnesses may be examined in open court in discretion of judge. In re Clarke, 9 Blatchf. 372. Usually witnesses are heard in court as to credibility of other witnesses and their depositions, or to verify exhibits. R. R. Co. v. Drew, 3 Woods, 692. A witness who has given his deposition cannot be examined anew without special order of court. Cass v. Stinson, 2 Sum. 605. Where leave is thus granted, witness can only be re-examined as to facts not already testified to by him. Jenkins v. Eldridge, 3 Story, 299.

**RULE 79.**

**Accounts, production and examination of party.** — All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party, *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

**RULE 80.**

**Affidavits, what used.** — All affidavits, depositions, and documents which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

**RULE 81.**

**Examination of creditor or claimant.** — The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or on both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

**RULE 82.**

**Appointment of masters, compensation.** — The circuit courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed

by the court he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if upon notice thereof he does not pay it within the time prescribed by the court.

**Master, appointment and compensation of.** — The appointment both of standing and special masters is left wholly with the circuit courts in their discretion. *Van Hook v. Peudleton*, 2 Blatchf. 85. Clerks and deputy clerks shall not be appointed masters, except on special grounds to be assigned in the order of appointment. Acts of Congress, 1879, ch. 183, p. 415. A master must file his report whether his fees are paid or not, but attachment will issue therefor if not paid (*Freese v. Biedenfeld*, 14 Blatchf. 402), and the issuance of this attachment is not stayed by proceedings for an appeal. *Myers v. Dunbar*, 12 Blatchf. 880.

## EXCEPTIONS TO REPORT OF MASTER

### RULE 83.

**When may be taken.** — The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise.

**Exceptions to master's report.** — The parties may except to the master's report, and thus bring any matter decided by him before the court for review (*St. Colombe v. U. S.* 7 Peters, 625); but such matter will not be set aside unless some abuse of power or clear abuse is shown. *Mason v. Crosby*, 3 Wood. & M. 258. On exception to master's report a general assignment of errors is insufficient. *Dexter v. Arnold*, 2 Sum. 108. The exceptions are in the nature of a demurrer, and the court will only regard errors specifically pointed out (*Story v. Livingstone*, 13 Peters, 359; *Green v. Bishop*, 1 Cliff. 186; *Foster v. Goddard*, 1 Black, 506; *Chappedelaine v. Dechenaux*, 4 Cranch, 306; *Turrill v. R. R. Co.* 5 Biss. 845), and supported by the special statement of the master. *Harding v. Handy*, 11

**Wheat. 104.** The exceptions should be precise, and raise well defined issues. *Stanton v. R. R. Co.* 2 Woods, 507. Master's report will not be corrected because immaterial evidence was wrongly admitted. *Garretson v. Clark*, 15 Blatchf. 70. The exceptions need not be formally allowed or disallowed on the record, but the master's report will be reformed accordingly. *Oliver v. Platt*, 3 How. 334. No objection to master's report can be urged which was not taken at the time and before the master. *McMicken v. Perin*, 13 How. 507; *Troy etc. Co. v. Corning*, 6 Blatchf. 323; *Gaines v. New Orleans*, 1 Woods, 104; *Cowdrey v. R. R. Co.* 1 Woods, 321.

#### RULE 84.

**Costs and exceptions.**—And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs, the costs to be fixed in each case by the court by a standing rule of the circuit court.

**Costs, what are.**—A solicitor's fee is not a cost within the meaning of this rule. *Garretson v. Clark*, 17 Blatchf. 256.

#### DECREEES.

##### RULE 85.

**Correction of clerical mistakes.**—Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

**Enrollment of.**—All decrees are deemed to be enrolled as of term in which they are made. *Dexter v. Arnold*, 5 Mason, 303; *Whiting v. U. S. Bank*, 13 Peters, 6.

##### RULE 86.

**Not contain pleadings.**—In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but

the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz." [Here insert the decree or order.]

**Form of decree.** — The decree should not recite pleadings or ordinarily facts of case (*Whiting v. U. S. Bank*, 13 Peters, 16); but the court may occasionally state in the decree conclusions of fact as well as of law. *Putnam v. Day*, 22 Wall. 60. There should be first an interlocutory order, and when the amounts and the like have been ascertained, the final decree should be entered. *Forgay v. Conrad*, 6 How. 201; *R. R. Co. v. Swasey*, 23 Wall. 405.

## GUARDIANS AND PROCHEIN AMIS.

### RULE 87.

**How appointed.** — Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

**Infants parties.** — Infants defend by guardian appointed by court; usually nearest relation not interested. *Bank of U. S. v. Ritchie*, 8 Peters, 128.

## REHEARING.

### RULE 88.

**Rehearing petition, what to contain.** — Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court. But if no appeal lies, the

petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

**Rehearing, when allowed.**—Rehearings are allowed only where some plain omission or mistake has been made (*Jenkins v. Eldredge*, 3 Story, 299), sufficient to justify a new trial at common law, (*Bentley v. Phelps*, 3 Wood. & M. 403), and the application for rehearing should state some such reason. *Hunter v. Marlboro*, 2 Wood. & M. 168. Where a party obtains rehearing on new evidence he should file a supplemental bill stating such evidence. *Baker v. Whiting*, 1 Story, 218. A rehearing will not be granted on the certificate of counsel merely, that there are good grounds therefor. *Emerson v. Daives*, 1 Wood. & M. 21; *Tufts v. Tufts*, 3 Wood. & M. 426. A petition for rehearing is not granted *ex parte*, but only on notice to the adverse party. *Giant Powder Co. v. Cal. V. P. Co.* 6 Sawy. 509. A final decree cannot be annulled or set aside after the term when rendered, except by appeal or bill of review and not by rehearing (*Scott v. Blaine*, 1 Bald. 287; *Roemer v. Simon*, 1 Otto, 149); and this rule is imperative (*Scott v. Hore*, 1 Hughes, 163), except where there is no appeal to the supreme court, when it may be reheard if petition for rehearing be filed before end of next term after decree. *Clarke v. Threkeld*, 2 Cranch, 408. Allowance of rehearings after decree are not a matter of right, but discretionary with court. *Daniel v. Mitchell*, 1 Story, 198; *American etc. Co. v. Sheldon*, 18 Blatchf. 50.

### RULE 89.

**Rules may be made by circuit courts.**—The circuit courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

**Extent of.**—Where no rule is prescribed by supreme court, circuit courts have power to regulate by rule, the model of conducting trials, order of evidence, etc. *Phila. etc. Co. v. Stimson*, 14 Peters, 443; *Steam S. C. Co. v. Jones*, 13 Fed. Rep. 581. Equity courts will mold their rules so as to prevent injustice. *Poultney v. Lafayette*, 12 Peters, 472. Rules made by the court can be waived or modified for good reason. *Russell v. McLellan*, 3 Wood. & M. 157. But this court cannot rescind or modify a rule prescribed by the supreme court for its government. *Jenkins v. Greenwald*, 1 Bond, 127. No rule can be allowed which is inconsistent with those established by the supreme court. *Bank of U. S. v. White*, 8 Peters, 262.



**RULE 90.**

**Practice.**—In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

**English practice, how far adopted.**—This rule adopts the English practice as it was known and understood at the time this rule was ordained. *Badger v. Badger*, 1 Cliff. 237. This rule neither enlarges nor limits the jurisdiction, but simply regulates the practice where this court has jurisdiction. *Lewis v. Shainwald*, 7 Sawy. 403. It is the practice of the English court of chancery, and not the court of exchequer that forms the basis of our equity practice. *Smith v. Burnham*, 2 Sum. 612. The courts will follow this practice subject to such alterations as may under the acts of Congress be from time to time prescribed (*Boyle v. Zacharie*, 6 Peters, 648; *Livingston v. Story*, 9 Peters, 632; *S. C.* 13 Peters, 359; *Rhode Island v. Massachusetts*, 14 Peters, 210; *Emerson v. Davies*, 1 Wood. & M. 21; *Lorillard v. Standard Oil Co.* 18 Blatchf. 199), and it shall govern the practice in all cases where the supreme court rules do not apply. *Pomeroy v. Manin*, 2 Paine, 476; *Good-year v. Prov. Rub. Co.* 2 Cliff. 351. The practice of State courts will not control these courts unless they adopt that practice as their own. *U. S. v. Parrott*, McAll. 447; *Martindale v. Waas*, 11 Fed. Rep. 551. And no practice inconsistent with these rules can be established. *U. S. Bank v. White*, 8 Peters, 262.

**RULE 91.**

**Affirmation equivalent to oath.**—Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof, make solemn affirmation to the truth of the facts stated by him.

**RULE 92.**

**Decree in foreclosure suits.**—In suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the Territories having jurisdiction of

the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

Promulgated April 18, 1864, 1 Wall. v.

### RULE 93.

**Appeal in injunction cases, discretion.**—When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

Promulgated January 13, 1879, 7 Otto, vii.

### RULE 94.

**Bill by stockholder against corporation.**—Every bill brought by one or more stockholders in a corporation against the corporation and other parties founded on a right which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and if necessary, of the shareholders, and the cause of his failure to obtain such action.

Promulgated January 23, 1882, 14 Otto, ix.

**Application of rule.**—This rule applies only to a suit by stockholders against corporation founded on rights which the

corporation may properly assert, and not on other rights. *Leo v. U. P. R. R. Co.* 17 Fed. Rep. 273. Plaintiff must show the efforts on his own part, and not on the part of others to secure redress. *Dannmeyer v. Coleman*, 11 Fed. Rep. 101.

# AMERICAN FORMS.

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## PART I.—BILLS AND INFORMATIONS.

### CHAPTER I.

#### FORMAL PARTS OF BILLS.

##### I. TITLE, DIRECTION, OR ADDRESS.

###### 1. *The title—general form.*<sup>1</sup>

—— Court.

A. B., of B., in the county of ——.

*Plaintiff.*

and

C. D., of C., in the county of ——.

*Defendant.*

###### 2. *Where complainant is a married woman.*

A. B., a married woman, who sues by C. D., her next friend.

*Plaintiff.*

and

E. F.

*Defendant.*

###### 3. *Where complainant is an infant.*

A. R., an infant within the age of twenty-one years, by C. D.,  
his next friend.

*Plaintiff.*

and

E. F.

*Defendant.*

<sup>1</sup> A general and comprehensive statement of the title is sufficient where plaintiff has no knowledge that the title will be controverted by defendant; but where the title is impeached by the answer, it is better to set out a distinct statement of the title by amendment instead of simply traversing defendant's answer. *Sanborn v. Kirtledge*, 50 Am. Dec. 58.

**4. *Where complainant is of unsound mind, and so found by inquisition.***

A. B., committee of the estate of C. D., a person of unsound mind, so found by inquisition, and the said C. D. by the said A. B. as his committee. *Plaintiffs.*

and

E. F. *Defendant.*

**5. *Where complainant is of unsound mind, but not so found by inquisition.***

A. B., a person of unsound mind, not so found by inquisition, by C. D., his next friend. *Plaintiff.*

and

E. F. *Defendant.*

**6. *Where one creditor sues on his own behalf and that of other creditors.***

A. B., on behalf of himself and all other unsatisfied creditors of C. D., who shall come in and contribute to the expenses of this suit [or, and all other the creditors of C. D., for whose benefit the indenture of the first day of June, 1883, hereinafter stated, was made]. *Plaintiff.*

and

E. F. *Defendant.*

**7. *Against a married woman administratrix, joining her husband as co-defendant.***

A. B. *Plaintiff.*

and

C. D. and E. [christian name of the wife], the wife of C. D., administratrix of the estate and effects which were of F. G., deceased. *Defendants.*

**8. *Against a person of unsound mind so found by inquisition.***

A. B. *Plaintiff.*

and

C. D., a person of unsound mind, so found by inquisition, who defends by E. F., committee of the estate of the said C. D. *Defendants.*

9. *Direction, or address in the Federal Courts.*

To the judges of the Circuit Court of the United States for the district of ———.<sup>1</sup>

10. *In the State courts.*

To the honorable the justices of the Supreme Judicial Court, sitting in equity.

*New Hampshire.*] Rockingham, ss. To the Supreme Judicial Court.

*Vermont.*] To the honorable A. B., chancellor of the ——— Judicial Circuit.

*New Jersey and New York.*] To the honorable A. B., Esq., chancellor of the State of ———.

## II. INTRODUCTION, OR COMMENCEMENT.

1. *In the Federal Courts.*

"A. B., of ———, and a citizen of the State of ———, brings this, his bill, against C. D., of ———, and a citizen of the State of ———, and E. F., of ———, and a citizen of the State of ———, and thereupon your orator complains and says that," etc.<sup>2</sup>

2. *In the State courts.*

*Generally, and in code States.*

A. B., of ———, etc., complains against C. D., of ———, etc., and E. F. of ———, etc., and says, etc.

*In suits by persons of full age and sui juris.*

Complaining sheweth unto your honor your orator A. B., of ———, in the county of ———, and State of ———, merchant [or esquire, or yeoman].

Complaining sheweth unto your honor your oratrix C. D.,

<sup>1</sup> Rule 20, U. S. Courts, Equity Rules. A bill addressed to the "Circuit Court, etc., in chancery sitting," is a sufficient address. *Sterrick v. Pugsley*, 1 Flipp. (U. S.) 350.

<sup>2</sup> Equity Rule 20 of the Federal Court Rules, requires the names of parties defendant, with their citizenship, to be set out. *United States v. Pratt Coal etc. Co.* 18 Fed. Rep. 708.

of ———, in the county of ———, and State of ———, widow [or spinster].

*By wife, where husband is defendant, as in respect of her separate property.*

Complaining sheweth unto your honor your oratrix A. B., of ———, in the county of ———, wife of C. B., of the same place, merchant, by G. H., her father (or brother) and next friend.

*By wife where husband is co-plaintiff.*

Complaining show unto your honor your orator and oratrix A. B., of ———, merchant, and C. D., his wife.

*By wife whose husband is an alien enemy.*

Complaining sheweth unto your honor your oratrix A. B., of ———, the wife of C. B., late of the same place, merchant, who is an alien enemy.

*By an infant.*

Complaining sheweth unto your honor, your orator A. B., of ———, an infant under the age of twenty-one years, to wit, of the age of six years, or thereabouts, and son of E. B., of the same place, gentleman, by the said E. B., his father and next friend (or son of E. B., late of ——— aforesaid, gentleman, deceased, by C. D., his next friend).

*By an idiot or lunatic, by his committee.*

Complaining show unto your honor your orators A. B., of ———, and C. D., of ———, against whom a commission of lunacy has been lately awarded and issued, and is now in force, and under which commission the said C. D. was duly found and declared to be a lunatic, and your orator A. B. appointed committee of his estate.

*By an idiot or lunatic, by his guardian.*

Complaining show unto your honor A. B., of ———, and C. D., of ———, who was lately adjudged an idiot (or lunatic, or incapable of taking care of himself), by the ——— Court of ———, and your orator A. B. appointed guardian of his person and estate (or of his estate).

*By a person incapable of acting for himself, but not strictly an idiot or lunatic.*

Complaining sheweth unto your honor your orator A. B., of ———, yeoman, being deaf and dumb, by C. D., of ———, yeoman, his next friend.

*By a corporation.*

Complaining show unto your honor your orators the president, directors, and company of the Bank of ———, a corporation duly established by law of the State of —

*By the government.*

Informing, sheweth unto your honor A. B., of ———, Esq., attorney-general of the State of ———, on behalf of the said State.

*By those who partake of the prerogative, or are under the protection of the government.*

Informing, sheweth unto your honor A. B., of ———, Esq., attorney-general of the state of ———, on behalf of the said State and the trustees of ——— College.

*Where the suit is at the relation of some person not particularly interested.*

Informing, sheweth unto your honor A. B., of ———, Esq., attorney-general of the State of ———, at and by the relation of C. D. and E. F., of ———, deacons of the First Congregational Church and Society in ———, for and on behalf of themselves and the rest of the members of the said church and society.

*The same where the relator is interested.*

Informing, sheweth unto your honor A. B., of ——— Esq., attorney-general of the State of ———, at and by the relation of C. D. and E. F. of ———, deacons of the First Congregational Church and Society in ———, and humbly complaining show unto your honors the said C. D. and E. F., deacons of the First Congregational Church and Society in ———.



### III. THE STATING PART.

(After setting out the facts showing plaintiff's equity.) And your orator [*or the plaintiff*] hoped that the said C. D. [the defendant] would have complied with the reasonable requests of your orator [*or the plaintiff*] as in justice and equity he ought to have done.

### IV. THE CONFEDERATING PART.

*But now so it is*, may it please your honor, that the said C. D., combining and confederating with divers persons [*or if there are several defendants, combining and confederating together and with divers persons*] at present unknown to your orator [*or the plaintiff*] whose names, when discovered, your orator [*or the plaintiff*] prays he may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orator [*or the plaintiff*] in the premises, he, the said R. H., absolutely refuses to comply with such requests, and he at times pretends that, etc.

*or*

*But now so it is*, may it please your honor, that the said R. H., L. M., and N. M., in concert with each other, allege that, etc. [*or colluding and confederating with each other, refuse to comply with such requests, and pretend that, etc.*]

### V. THE CHARGING PART.<sup>1</sup>

That the said defendant sometimes alleges and pretends [*insert the supposed contention of defendant*], and at other times

<sup>1</sup> Every bill must contain sufficient matter in itself to maintain the case of the plaintiff (*Harrison v. Nixon*, 9 Peters. 483); but it need not allege or specially describe all the evidence which is to be put into the case, provided it contains allegations broad enough to cover the evidence relied on. *Nesmith v. Calvert*, 1 Wood. & M. 34. While the bill may be framed with a double aspect, so that if the court decide against the plaintiff upon one view of his case it may afford him relief in another (*Hobson v. McArthur*, 16 Peters. 182); yet the alternative case must be the foundation for the same relief. *Shields v. Barrow*, 17 How. 130. Two inconsistent causes for equitable relief cannot be joined in the same bill. *Wilkinson v. Dobbie* 12 Blatchf. 280.

Rule 21 of the U. S. Courts Equity Rules authorizes the optional omission of the matters of excuse and pretenses set up by defendant.

he alleges and pretends, etc., whereas, your orator [*or the plaintiff*] charges the contrary to be the truth, and that, etc. [*stating the special matter with which plaintiff meets defendant's supposed case*].

## VI. THE JURISDICTION CLAUSE.<sup>1</sup>

All which actings, doings, and pretenses of the said defendant [*or defendants*] are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator [*or the plaintiff*] in the premises. In consideration whereof, and forasmuch as your orator [*or the plaintiff*] is remediless in the premises, at and by the strict rules of the common law, and can only have relief in a Court of Equity, where matters of this nature are properly cognizable and relievable. To the end, therefore, etc.

## VII. THE INTERROGATING PART.

To the end, therefore, that the said C. D., and the rest of the confederates when discovered, may, upon their several and respective corporal oaths, full, true, direct, and perfect answer make, to all and singular the matters hereinbefore stated and charged [*or, to all and singular the premises, or, to all and singular the charges and matters aforesaid*] as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated [*or, as fully in every respect as if the same were here again repeated, and they thereunto particularly interrogated*]: and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay, and belief [*or, according to the best of their respective knowledge, information, and belief*]; and more especially, that they

<sup>1</sup> This clause may be omitted in the Federal Courts. Rule 21, Equity Rules, U. S. Courts. But where the jurisdiction depends on citizenship of the parties in different States, this must appear somewhere in the bill, or the omission will be fatal at any stage of the cause, unless cured by amendment. *Wood v. Mann*, 1 Sumn. 578. Jurisdictional facts stated in the bill will be deemed to be true in a suit on a decree when collaterally attacked. *Harrison v. Harrison*, 56 Am. Dec. 227.

may answer and set forth whether, etc. [*here follow the interrogatories to be answered by the defendant*].

*Or, in suits in the Circuit Courts of the United States.*<sup>1</sup>

"To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer, that is to say:—

"1. Whether, etc.

"2. Whether, etc."

## VIII. THE PRAYER FOR RELIEF.<sup>2</sup>

### 1. *Old form.*

[*After the interrogating part*] and that the said defendant may come to a fair and just account, etc. [*stating the particu-*

1 See Rule 43, U. S. Courts, Equity Rules.

2 Rule 21 of the U. S. Courts, Equity Rules, provides that, "The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled. and also shall contain a prayer for general relief, and, if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is required, it shall also be specially asked for."

A prayer for general relief is a prayer for any relief the court can give, except by injunction, upon the facts averred in the bill. *Chicago, St. Louis, etc. R. R. Co. v. McComb*, 2 Fed. Rep. 18.

Under the prayer for general relief, other relief may be granted than that which is particularly prayed for; but such relief must be agreeable to the case made by the bill. *English v. Foxall*, 2 Peters, 595; *Boone v. Chiles*, 10 Peters, 177; *Hobson v. McArthur*, 16 Peters, 182. Thus, although the complainant in a bill for the specific execution of a contract may not have specifically claimed in his bill a decree for rents and profits while in the possession of the defendant, he may claim it in the appellate court, under the prayer for general relief. *Watts v. Waddle*, 6 Peters, 389. But where a bill charges actual and intentional fraud, and prays for relief on that ground, the complainant cannot, under the prayer for general relief, rely on circumstances which might amount to a case for relief, under a distinct head of equity, although those circumstances substantially appear in the bill, but are charged in aid of the charge of actual fraud. *Eyre v. Potter*, 15 How. 42.

The general prayer for relief and sufficient facts alleged therefor saves a bill from demurrer, though the special relief prayed for be inappropriate. *Patrick v. Isenhardt*, 20 Fed. Rep. 339.

*lar relief asked*], and that your orator may have such further and other relief in the premises, as the nature of his case shall require, and to your honors shall seem meet [*or, that your orator may be further and otherwise relieved in the premises according to equity and good conscience*].

## 2. *Modern form.*

And that an account may be taken by and under the direction and decree of this honorable court, etc., etc. And that the defendant may be decreed to pay unto your orator [*or the plaintiff*], etc., etc. And that your orator [*or the plaintiff*] may have such further or other relief in the premises as the nature of the circumstances of this case may require, and to your honor shall seem meet.

## 3. *A more extended form.*

*Prayer for answer, oath waived—injunction against proceeding at law—declaration of trust—conveyance:* “To the end, therefore, that the plaintiffs may have that relief which they can only obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by the plaintiffs, and that the said defendants, who are plaintiffs as aforesaid in the said action at law, may be perpetually enjoined from further prosecuting the same, and that it may be declared that the said lands are charged with a trust in favor of, and ought to be held for, the use and benefit of, etc., and that the said defendants, or so many and such of them as shall appear to have the legal title to said lands, may be decreed to convey such legal title, free of all encumbrances done or suffered by them, or any or either of them unto the plaintiffs, in their said capacity, to hold to them and their, etc., upon the trusts aforesaid, and for such further or other relief as the nature of this case may require, and to your honors shall seem meet.”<sup>1</sup>

Where a specific relief is asked for, even though there be a prayer for general relief, the Circuit Court cannot grant a relief which is inconsistent with, or entirely different from that which is prayed for. *Wilson v. Graham*, 4 Wash. (U. S.) 53.

<sup>1</sup> *Earl v. Wood*, 8 Cush. 430.

#### 4. *Another form of prayer for injunction.*

Wherefore your orator prays the court to now grant him a writ of injunction, restraining and enjoining the said defendants here [*insert the special matters sought to be enjoined*], until the further order and decree of this court in the premises.

#### 5. *Prayer for the production of deeds, papers, etc.*

And that the said defendants may set forth a list or schedule, and description of every deed, book, account, letter, paper, or writing relating to the matters aforesaid, or either of them; or wherein or whereupon there is any note, memorandum, or writing relating in any manner thereto, which now are, or ever were, in their or either, and which, of their possession or power, and may deposit the same in the office of the clerk [*or in the hands of one of the masters*] of this honorable court, for the usual purposes; and otherwise that the said defendants may account for such as are not in their possession or power.<sup>1</sup>

### IX. THE PRAYER FOR PROCESS.

#### 1. *Prayer for subpoena.*

May it please your honors to grant unto the plaintiff a writ of subpoena, to be directed to the said C. D.,<sup>2</sup> etc., thereby commanding them, and each of them, at a certain time, and under a certain penalty therein to be limited, personally to appear before this honorable court [*or your honors in this honorable court*], and then and there full, true, direct, and perfect answer make to all and singular the premises, *and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court [or, to your honors] shall seem meet [or as shall seem agreeable to equity and good conscience<sup>3</sup>]*.

<sup>1</sup> Dan. Ch. Pr. \*1888.

<sup>2</sup> The prayer for *subpoena* must contain the names of all the defendants. See Rule 23, U. S. Court Rules in Equity.

<sup>3</sup> The words in italics must be omitted in bills merely for *discovery*, or *to perpetuate the testimony of witnesses*. Story Eq. Pl. § 41, note; Barton's Suit in Eq. 43, note 1; Equity Drafts. 6. The bill must be signed by counsel or it will be demurrable; but a signing on the back of the bill is sufficient. *Dwight v. Humphreys*, 3 McLean (U. S.) 104.

## 2. *Another form.*

To the end that your orator may obtain the relief to which he is justly entitled in the premises, he now prays the court to grant him due process by *subpœna* directed to the said C. D. and E. F., defendants hereinbefore named, requiring and commanding each of them to appear herein and answer under oath [or, *but not under oath, the same being expressly waived*] the several allegations in this your orator's bill contained.

## 3. *Prayer for process where the government is a defendant.*

And may it please your honors, that the district attorney of the United States for the district of —— [or the attorney-general of the State of ——], on being attended with a copy of this bill, may appear and put in his answer thereto, and may stand to and abide such order, direction, and decree in the premises as to your honors shall seem meet, and your orator shall ever pray, etc.

## 4. *Prayer for writs of ne exeat, and subpœna.*

May it please your honors, the premises considered, to grant unto your orator, not only the writ of *ne exeat* of the State of ——, issuing out of, and under the seal of this honorable court, to restrain the said defendant C. D. from departing out of the jurisdiction of this court; but also the writ of *subpœna* (as in forms 1 or 2, *supra*).

## 5. *Another form of prayer for ne exeat.*

Wherefore your orator prays the court to grant him a writ of *ne exeat*, restraining and forbidding the said C. D., defendant hereinbefore named, from departing beyond the limits of the United States [or, *if the suit is in a State court, from departing out of the jurisdiction of this court, or beyond the limits of this State*], without leave of this court first had.

## 6. *Prayer for writ of certiorari.*

May it please your honors, therefore, to grant unto your orator a writ of *certiorari*, to be directed to the justices of the said —— Court of ——, thereby commanding them upon the re-

ceipt of the said writ, to certify and remove the said bill and all proceedings thereon into this honorable court; and to stand to and abide such order and direction as to your honors shall seem meet, and the circumstances of the case require, and your orator shall ever pray, etc.

## CHAPTER III.

## ORIGINAL BILLS PRAYING RELIEF.

## X. BILLS FOR SPECIFIC PERFORMANCE OF AGREEMENTS.

1. *Bill by vendor against purchaser, for specific performance of written agreement for purchase of an estate, title only being in dispute.<sup>1</sup>*

[Title and address.]

Humbly complaining sheweth unto your honors your orator, J. O., of, etc., Esq., that your orator being seised or well entitled in fee-simple of or to a certain messuage or dwelling-house with the appurtenances situate at ———, and hereinafter described, and being desirous of selling such premises, and D. E., of ———, being minded to purchase the same, your orator and the said D. E., on or about the ——— day of ———, entered into and signed a memorandum or agreement respecting the said sale and purchase in the words following, that is to say: [*Insert the agreement verbatim.*] As by the said memorandum of agreement, to which your orator craves leave to refer, when produced will appear. And your orator further sheweth that the said D. E. paid to your orator the sum of \$1500, part of the said purchase money at the time of signing the said agreement, and your orator delivered an abstract of his title to the said premises to the said D. E.; and your orator hath always been and still is ready and willing to perform his part of the said agreement, and being paid the remainder

<sup>1</sup> In a bill by the vendor against the purchaser, if plaintiff relies upon an acceptance of title by the defendant as a ground for dispensing with the usual inquiry as to title, he must set out a specific charge to that effect, although the facts and circumstances stated in the bill would warrant the conclusion that the title had been accepted. *Clive v. Beaumont*, 1 De Gex & S. 387; *Gaston v. Frankum*, 2 De Gex & S. 561.

The bill may be made to ask rescission together with other relief in a suit on a contract to exchange lands, where it appears on the trial that the defendant cannot make a title. *Parrill v. McKinley*, 58 Am. Dec. 212. As to obtaining relief in these cases by means of injunction, see Pom. Eq. Jur. §§ 1341-1344.



of his said purchase money with interest, to convey the said messuage to the use of the said D. E. and his heirs, and to let him into possession and receipt of the rents and profits thereof from the time in the said agreement in that behalf mentioned; and your orator hoped that the said D. E. would have performed the said agreement on his part as in justice and equity he ought to have done. But now so it is, may it please your honors, that the said D. E. alleges that he is and always hath been ready and willing to perform the said agreement on his part in case your orator could have made or can make him a good and marketable title to the said messuage and premises. But that your orator is not able to make a good title thereto: whereas your orator charges that he can make a good title to the said messuage and premises. To the end, therefore, that the said D. E. may upon his oath true answer make to the matters aforesaid, and more particularly that he may answer and set forth in manner aforesaid, whether, etc. [*Interrogating to the stating and charging parts.*]

And that the said D. E. may be compelled by the decree of this honorable court specifically to perform the said agreement with your orator, and to pay to your orator the remainder of the said purchase money with interest for the same from the time the said purchase money ought to have been paid, your orator being willing and hereby offering specifically to perform the said agreement on his part, and on being paid the said remaining purchase money and interest to execute a proper conveyance of the said messuage and premises to the said D. E., and to let him into possession of the rents and profits thereof from the said ——— day of ———. And that your orator may have such further or other relief in the premises as to your honors shall seem meet and this case may require. May it please, etc. (*Prayer for a subpoena as in forms on pages 330, 331.*)

2. *Short English form of bill for specific performance by vendor against vendee.*

Humbly complaining, etc., A, B., of, etc., the above-named plaintiff, shows as follows:—

1. In and previously to the month of June, 1851, plaintiff

was absolutely entitled to a certain estate called, etc., situate at, etc., in the county of ———.

2. On the ——— day of June, 18—, defendant agreed to purchase the said estate; and a memorandum of such agreement was reduced into writing, and duly signed by defendant. Such memorandum was in the words and figures, or to the purport and effect following. [*Memorandum set out.*]

3. The plaintiff has frequently applied to defendant, and requested him to perform the said agreement, but he has refused and neglected to do so.

The plaintiff prays as follows:—

1. That the defendant may be decreed specifically to perform the said agreement of the ——— day of June, 18—, the plaintiff hereby offering specifically to perform the said agreement upon his part; and that for the purposes aforesaid all proper directions may be given, and inquiries made.

2. That the plaintiff may have such further or other relief as the nature of the case may require.

3. *Bill by purchaser against vendor charging that purchase money has remained unproductive in plaintiff's hands.*<sup>1</sup>

[*Title and address.*]

Humbly complaining sheweth unto your honors your orator H. A., of, etc., Esq., that S. B., etc., Esq., being or pretending to be seised and possessed of or otherwise well entitled unto a certain parcel of land and the appurtenances thereunto adjoining or belonging, situate at, etc., and hereinafter mentioned, and the inheritance in fee-simple thereof, did on or about the ——— day of ——— cause all the said premises to be put up to sale by public auction by M. W., auctioneer, at ———, in three lots pursuant to printed particulars and conditions of sale previously advertised and published. And your orator further

1 The bill should aver that plaintiff has performed his part of the contract, or that he is willing and ready to perform, but a failure to make such an averment is amendable: it may be a defect in form only. *Chess' Appeal*, 45 Am. Dec. 668.

Where the bill is denied because of failure to make out a proper case, the court will retain it for the purpose of granting compensation to one who in faith of the agreement to convey has made valuable improvements, and whose remedy at law is incomplete. *Adair v. Ecols*, 52 Am. Dec. 225.

showeth that the said premises were bought in by the said S. B. at the time of the said sale, and that in or about the month of April then next ensuing your orator entered into a treaty with the said S. B., for the absolute purchase of the same estate and premises, together with the timber and other trees, fixtures, and other effects in or about the same, discharged from all encumbrances at or for the price or sum of \$2000. And your orator further showeth unto your honors that the said S. B. agreed to accept the said sum of \$2900 as the consideration for the said estate and premises, and thereupon an agreement in writing was entered into and signed by your orator and the said S. B. respecting such sale and purchase in the words and figures or to the purport and effect following, that is to say: [*Stating the agreement verbatim.*] As by the said agreement, to which your orator craves leave to refer, when the same shall be produced will appear. And your orator further showeth, that previously to the signing of the said agreement your orator paid unto the said S. B. the sum of \$500 as a deposit and in part of his said purchase money or sum of \$2900; and the said S. B. hath since delivered up possession of the said purchased premises to your orator. And your orator further showeth unto your honors, that he hath always been ready and willing to perform his part of the said agreement, and on having a good and marketable title shown to the said estate and premises, and a conveyance of the fee-simple thereof discharged of all encumbrances made to him, to pay the residue of the said purchase money or sum of \$2900 to the said S. B. And your orator hoped that the said S. B. would have specifically performed his part of said agreement as in justice and equity he ought. But now so it is, etc. (*see form No.     , p.* ), the said S. B. refuses to perform his part of the said agreement, and to color such refusal he gives out and pretends that he is unable to make out a good and marketable title to the said estate and premises, and that he is willing to cancel the said contract or agreement and to repay the said deposit or sum of \$500 to your orator. Whereas your orator charges that the said S. B. is able to make out a good and marketable title to the said estate and premises if he thinks proper so to do, but

that the said S. B. refuses and declines to make out a good and marketable title to the said estate and premises, notwithstanding your orator hath required him so to do, and offered to pay him the residue of the purchase money upon having the title made out and a proper conveyance of the said premises executed to your orator, his heirs and assigns, by the said S. B. And your orator charges that the whole of the residue of his purchase money of the premises hath been ready and unproductive in his hands for completing the said purchase from the time it ought to have been completed by the terms of the said agreement. All which actings, refusals, and pretenses, etc., etc. (*see form No. , p.* ) and more especially, that the said S. B. may in manner aforesaid answer and set forth.

Whether he was not seised and possessed of or otherwise well entitled unto the said estate with the appurtenances thereto adjoining or belonging and the inheritance in fee-simple thereof; and whether, being so seised and entitled as aforesaid, he did not at the time hereinbefore in that behalf mentioned, or at some other, and what time, cause all the said estate and hereditaments to be put up to sale by public auction, by the said M. W. at ———, in three lots, pursuant to printed particulars and conditions of sale previously advertised and published thereof; and whether the said premises were not bought in by him, the said defendant, at the time of the said sale, or how otherwise; and whether your orator did not in or about the said month of April, or when else, enter into a treaty with the said defendant for the absolute purchase of the same estate and premises, together with the timber and other trees, fixtures, and other effects in and about the same, discharged from all encumbrances, at or for the price or sum of \$2900, or at some other and what price; and whether the said defendant did not agree to accept the said sum of \$2900 as the consideration for the said estate and premises; and whether thereupon such agreement in writing of such date, or of or to such purport and effect as hereinbefore in that behalf mentioned, was not duly entered into and signed by the respective solicitors for your orator and the said defendant in the name and on the behalf of your orator and the said defendant, or how otherwise; and

whether your orator did not previously to the signing of the said agreement pay the said defendant the sum of \$500 as a deposit and in part of his said purchase money or sum of \$2900; and whether the said defendant hath not since delivered up possession of the said purchased premises to your orator; and whether your orator hath not always been ready and willing to perform his part of the said agreement, and on having a good and marketable title shown to the said estate and premises and a conveyance of the fee-simple thereof discharged of all encumbrances made to him, to pay the residue of the said purchase money or sum of \$2900 to the said defendant; and whether the said defendant doth not, and why, refuse to perform his part of the said agreement; and whether the defendant is not able to make a good and marketable title to the said estate and premises, and if not, why not; and whether he doth not, and why, decline or refuse to make a good and marketable title to the said premises; and whether your orator hath not required him so to do, and made such offer to him as in that behalf aforesaid, or to that, or the like, or some, and what, other purport or effect; and whether the whole of the residue of the purchase money of the said premises hath not been ready and unproductive in the hands of your orator for completing the said purchase from the time the same ought to have been completed by the terms of the said agreement, or from some, and what, other time; and that the said defendant may be decreed specifically to perform the said agreement entered into with your orator as aforesaid, and to make a good and marketable title to the said premises, your orator being ready and willing, and hereby offering specifically to perform the said agreement on his part, and upon the said defendant's making out a good and marketable title to the aforesaid estate and premises, and executing a proper conveyance thereof to your orator pursuant to the terms of the said agreement, to pay to the said defendant the residue of the said purchase money or sum of \$2900. And that your orator may have such further and other relief in the premises as to your honors shall seem meet and the nature of this case may require. May it please, etc. (*Pray subpoena against S. B.*)

**4. Bill by lessee against lessor for specific performance of a written agreement for the lease of a house.**

[Title and address.]

Humbly complaining sheweth unto your honors your orator A. B., of, etc., that C. D., of, etc. (the defendant hereinafter named), being or pretending to be seised or possessed of a messuage or tenement situate, etc., and being willing and desirous to let the same, he in the month of —— proposed and agreed to grant unto your orator a lease of the aforesaid premises with the appurtenances, and thereupon your orator and the said C. D. duly executed or subscribed a certain memorandum or agreement bearing date, etc. (*Stating the agreement.*) As in and by, etc. And your orator further sheweth that in expectation and confidence that a lease would have been made and executed to him of the said messuage or tenement and premises, pursuant to the terms of the said agreement, your orator hath laid out sundry sums in repair of the said premises to a considerable amount. And your orator further sheweth, that your orator hath been always ready to perform his part of the said agreement, and to accept a lease of the said premises pursuant to the terms thereof. And your orator for that purpose caused a draft of a lease to be drawn pursuant to the terms of the aforesaid agreement, and tendered the same to the said defendant for his perusal and approbation, but he refused to accept or peruse the same. And your orator further sheweth, that he hath frequently by himself and his agents applied to the said C. D., and in a friendly manner requested him to make and execute unto your orator a lease of the said messuage or tenement and premises conformably to the said agreement. And your orator well hoped, etc. But now so it is, etc. (*See form No. , p. .*) Defendant pretends that no such agreement as aforesaid was ever made or entered into by or between the said defendant or your orator, or any agreement, or that he consented to grant a lease to your orator of the aforesaid messuage or tenement and premises. Whereas your orator charges the contrary of such pretenses to be the truth. And so the said confederate will at other times admit, but then he pretends that he hath always been ready and willing to

make and execute a lease of the said messuage or tenement and premises pursuant to the terms of the said agreement, and in all respects to perform the same on his part. Whereas your orator charges the contrary thereof to be the truth. But nevertheless, the said defendant refuses to comply with your orator's aforesaid requests, or to perform or fulfill the aforesaid agreement. All which actings, etc. (*See form No. , p.*

*, interrogating to the stating and charging parts.*) And that the said agreement may be especially performed and carried into execution, and that the said defendant may be decreed to execute a lease of the aforesaid messuage or tenement and premises to your orator according to the terms of the aforesaid agreement. Your orator hereby offering to execute a counterpart thereof and in all other respects to perform his part of the said agreement. (*And for further relief, see form No. , p. .*) May it please, etc. (*Pray subpoena against C. D. See form No. , p. .*)

**5. Bill for specific performance of an agreement to convey, against an administrator and minor children.**

[*Title and address.*]

A., B., of, etc., humbly complaining, sheweth that C. D., of, etc., etc., being seised and possessed of a certain parcel of real estate, situate, etc. (*give the description and boundaries*), entered into a written agreement with the plaintiff for the purchase and sale thereof, as follows, viz. (*state the agreement*) [*or a copy of which agreement is hereto annexed*], as by the said agreement, which the plaintiff has here in court ready to be produced, and to which he craves leave to refer, will appear [*or as by said agreement hereto annexed will appear*]. And the plaintiff further shows that, pursuant to the said agreement, he has paid the taxes on the said premises for the year, etc., amounting to the sum of \$——. And the plaintiff further shows, that, since the making of the said agreement, to wit, on the, etc., the said C. D. died intestate, and that, during his lifetime he never made any conveyance of the said premises to the plaintiff; that the said C. D. left a widow, M. A. D., and four children, viz., M. D., L. D., M. A. D., and

J. D., all of whom are minors under the age of twenty-one years, and the sole heirs of the said C. D. That S. K., of, etc., Esq., has been duly appointed administrator of the goods and estate, which were of the said C. D.; but no person, as yet, has been appointed guardian of the said minor children. And the plaintiff further shows that he is desirous of obtaining a conveyance of the said real estate, pursuant to the terms of said agreement between the plaintiff and the said C. D., deceased, and is willing and ready to pay therefor the price stipulated in the said agreement in cash, or to give his note of hand, secured by mortgage of the premises, as is provided in the said agreement, and further that he is willing to waive any claim which he has upon the heirs of the said C. D., or upon his administrator, to advance the sum of \$——, upon the erection by him of two dwelling-houses on the said real estate, as the said C. D. agreed that he would do. And the plaintiff further shows that he has made application to the said M. A. D., the widow of the said C. D., and ascertained that she is willing to release to the plaintiff her dower in the premises, upon having the interest of one-third part of the purchase money secured to and paid to her during the period of her natural life, or having paid to her an amount equal to the present value of her said life interest. But by reason that the said C. D. died intestate, there is no person who has legal authority to execute a deed, whereby to convey to the plaintiff the fee of the said real estate, of which the said C. D. died seised. In consideration whereof, etc. *To the end, therefore,* that the said S. K., the said M. D., the said L. D., M. A. D., and J. D. may, upon their several and respective oaths, etc., etc. [*See form of interrogating part, ante, No. , p.* ], and that the said S. K., and the said M. D., L. D., M. A. D., and J. D. may be decreed specifically to perform the said agreement entered into by the said C. D. with the plaintiff, the plaintiff being ready and willing and hereby offering specifically to perform the said agreement on his part; and that the plaintiff may have such other and further relief, etc., etc. (*Prayer for a subpoena*)

6. *Prayer of a bill by a surety to compel specific performance of an agreement to execute a mortgage to indemnify*



*plaintiff from all liability; praying also for a writ of ne exeat.*<sup>1</sup>

And that the defendant may be decreed specifically to perform the said agreement, and to make a mortgage to the plaintiff of the said estate and premises to indemnify him against the obligation he has entered into in the Admiralty Court as hereinbefore mentioned. And that it may be referred to a master to settle such conveyance if the parties should differ about the same. And that the defendant may be restrained from going out of the jurisdiction of this honorable court, into parts beyond the seas or into ———, and that for that purpose a writ of *ne exeat regno* may be issued out of and under the seal of this honorable court to restrain the defendant from going out of the State [or commonwealth] of, etc. [or into parts beyond the seas, or out of the jurisdiction of this honorable court.] (*Prayer for general relief.*)

7. *Bill to enforce specific performance of a contract to make a policy of insurance.*<sup>2</sup>

To the judges of the Circuit Court of the United States, for the district of Massachusetts.

The Union Mutual Insurance Company, a corporation duly established by the laws of the State of New York, doing business at the city of New York, in the State of New York, bring this their bill of complaint against the Commercial Mutual Marine Insurance Company, a corporation duly established by the laws of the commonwealth of Massachusetts, doing business at the city of Boston in said commonwealth.

And thereupon your orators complain and say, that in and by their charter and by the laws of the State of New York, they were, on the second day of November, 1853, and ever since have been, authorized and empowered to make insurance, among other things, against loss by the perils of the seas and against loss by fire; that your orators on the said second day of November, underwrote and caused one D. McKay to be insured for

<sup>1</sup> 3 Dan. Ch. Pr. \*1897.

<sup>2</sup> Union Mut. Ins. Co. v. Commercial Mut. Mar. Ins. Co. 2 Curt. (U. S.) 524.

whom it might concern, payable in the event of loss to the said McKay, on one-eighth of the good ship Great Republic, the said ship having been valued at one hundred and seventy-five thousand dollars, the sum of twenty-two thousand dollars, for the term of one year at and from the second day of November, 1853, at noon, until the second day of November, 1854, at noon, against loss from sundry designated risks, and especially from loss from the perils of the seas and from loss by fire, as will more fully appear from a copy hereunto annexed and made a part of this bill, of the policy issued by your orators to the said D. McKay.

Your orators further say, that thereafter the aforesaid insurance so made by your orators upon the Great Republic, and on the night of the twenty-sixth of December, 1853, the said ship was totally destroyed and lost by fire, one of the perils insured against; that your orators thereupon became liable to pay, and thereafter such loss did pay, to the said D. McKay, the full sum of twenty-two thousand dollars, the amount so as aforesaid by your orators underwritten.

Your orators further say that after they had insured the said McKay, as aforesaid, and before the loss aforesaid of the said ship, and before the commencement of the fire by which its destruction was produced, your orators requested and authorized Charles W. Storey, of Boston aforesaid, insurance broker, to cause and procure your orators to be re-insured in the sum of ten thousand dollars upon the said Great Republic, for the term of six months, against all and singular the risks by your orators theretofore assumed, and especially against loss from the perils of the seas and from fire.

Your orators further say, that the said Charles W. Storey, as the agent of your orators, in that behalf duly authorized and in their name and behalf, on Saturday, the twenty-fourth day of December, 1853, made application to the said defendants for the re-insurance by them of your orators upon the said Great Republic, in and for the sum of ten thousand dollars, for the term of six months from the twenty-fourth day of December aforesaid, against such risks as your orators had assumed, and especially against loss from the perils of the seas and against

loss from fire ; that the said application so made by the said Storey was made at the office and usual place of business of the said Commercial Mutual Marine Insurance Company in Boston ; that it was so made in the first instance to the secretary of the defendants, and immediately thereafter, and on the day last aforesaid, to George H. Folger, the president of the defendants, who was duly authorized to receive and act thereupon for the defendants

Your orators further say, that upon the making of the said application, the said George H. Folger, after consulting and advising with some person then present, whose name is to your orators unknown, replied to the said Storey, that the defendants would re-insure your orators, in the sum of ten thousand dollars, upon the said Great Republic, and would assume the risks proposed for the term of one year, at and for a premium of six per cent upon the sum to be underwritten ; that they would insure against the said risks for the term of six months, at and for a premium of three and one half of one per cent upon the sum to be insured.

Your orators further say, that the said Storey, immediately thereafter the said application, communicated to your orators the terms upon which the said defendants would re-insure your orators upon the said Great Republic.

Your orators further say, that on the said twenty-fourth day of December, your orators upon being advised by the said Storey as aforesaid, directed, authorized, and requested the said Storey, in the name and behalf of your orators, to accept the terms aforesaid, for six months, and to procure for your orators a re-insurance, in accordance therewith, from the 24th of December aforesaid.

Your orators further say, that the said Storey as agent, and in behalf of your orators, on Monday, the twenty-sixth day of the said December, at or about eleven o'clock before noon, at the place of business of the said defendants in Boston, and before any loss or damage had occurred to the said Great Republic, notified the said Folger that your orators had accepted the proposition of the defendants to re-insure your orators for the term of six months from the 24th of December aforesaid, at noon.

Your orators further say, that on the said twenty-sixth day of December, and before any loss or damage had occurred to said ship, the above-named Storey, in behalf of your orators, embodied in a paper partly printed and partly written, the terms of the contract of re-insurance, so as aforesaid, on the said 24th of December, in answer to the aforesaid application, proposed to your orators by the said defendants, and so as aforesaid accepted on the morning of the 26th of December.

Your orators further say, that the said paper was examined, approved, and retained by the said Folger, he in this behalf acting for the defendants, and by him was, in the name of the defendants, assented to, and thereupon a contract of re-insurance by and between the defendants and your orators was complete and concluded, upon the terms in said paper contained, by force whereof the defendants became and were liable and agreed to and with your orators to pay to them the sum of ten thousand dollars, in the event that the said ship Great Republic should be lost or damaged within six months from and after noon of the said 24th of December, by the perils of the seas or by fire.

Your orators further say, that the said Folger, in behalf of the defendants, and in their name and behalf, agreed with the said Storey, he acting for your orators, that a policy should be prepared and executed by the said defendants to your orators, at the early convenience of the defendants, and delivered to your orators, containing with other usual and accustomed clauses, the terms of the contract of re-insurance, so as aforesaid concluded by and between your orators and the defendants, and so as aforesaid embodied and set forth in the paper aforesaid.

Your orators further say, that the said Storey, on the twenty-sixth day of December aforesaid, was authorized, ready, and willing in behalf of your orators to pay to the defendants, or secure to their satisfaction, at their election, the premium, so as aforesaid agreed upon, on the said re-insurance, but the same was not then paid, because the defendants were accustomed not to receive the premiums by them required in their contracts of insurance until the preparation and delivery of the policies by them agreed to be issued.

Your orators further say, that the said Storey, on the said twenty-sixth day of December, immediately upon the conclusion of the aforesaid contract of re-insurance, advised your orators of its completion.

Your orators further say, that the said Storey, on Tuesday, the twenty-seventh day of December aforesaid, notified the defendants that the said ship had been destroyed by fire and was totally lost, and at the same time asked Edmund R. Whitney, secretary at the time of the defendants, in the presence and hearing of the said Folger, at the office of the said defendants, if the policy had been prepared for your orators, to which the said Whitney, in the hearing of the said Folger, said no, assigning no reason for the delay, or intimating any refusal to execute such policy.

Your orators further say, that the said Storey, on Wednesday, the 28th of December, called a second time at the office of the defendants and asked for the said policy, to which the said Folger replied, he was in doubt whether the contract was complete and obligatory, as it was made on a day regarded as Christmas-day, but he, the said Folger, had not made up his mind about it, and did not want to talk on the subject then.

Your orators further say, that one F. S. Lothrop, on the 13th of January, 1854, in behalf of your orators, made a draft upon the defendants for the sum of nine thousand six hundred and fifty dollars, the amount of said re-insurance, less the premium, payable at sight, to John S. Tappan, your orators' vice-president, which draft was thereafter, on the first day of February, 1854, presented to the defendants, which they refused to pay or accept.

Your orators further say, that the said Storey, in behalf and in the name of your orators, in that behalf duly authorized, on the twenty-sixth day of April, 1854, at the office of the defendants, made demand upon the aforesaid Folger, for the execution and delivery of the policy so as aforesaid by the said defendants theretofore agreed to be by them executed and to your orators to be delivered, and at the same time tendered to the said defendants the sum of three hundred and sixty dollars as and for premium, interest, and cost of policy, with which

request the said Folger, in the name of the said defendants and in their behalf, refused to comply.

Your orators further say, that they have applied to the defendants for a copy of the aforesaid paper so left with them on the 26th of December, which they refused to furnish.

And your orators well hoped that the defendants would have complied with the reasonable requests of your orators.

To the end, therefore, that the said defendants may, if they can, show your orators should not have the relief hereby prayed, and may, according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogations hereinafter numbered and set forth as by the note hereunder written they are required to answer, that is to say:—

1. Whether, upon your information and belief, etc.
2. Whether, etc.
3. Whether, etc.

Etc., etc.

And your orators pray that the defendants may discover and produce the original paper or memorandum, so as aforesaid made by said Storey, and dated 24th of December, 1853, which was so as aforesaid left with their president at their place of business on the aforesaid 26th of December.

And that the said agreement of the defendants to execute and deliver to your orators a policy of re-insurance, according to the terms of the aforesaid paper, and in accordance with the defendants' contract of insurance as aforesaid, may be specifically performed, your orators hereby undertaking to perform their undertakings in the premises.

And that the said defendants may be decreed to pay to your orators the sum of ten thousand dollars, the sum so as aforesaid by them re-insured to your orators, with interest thereon. And that your orators shall have such other and further relief as the case may require and as shall seem meet to the court, and as shall be agreeable to equity and good conscience.

And your orators pray this honorable court to issue a writ of *subpoena* in due form of law according to the rules of this court, to be directed to the Commercial Mutual Marine Insurance

Company, a corporation by the law of Massachusetts, at Boston, commanding them on a certain day and under a certain penalty to be and appear before this honorable court, and to stand to, abide, and perform such order and decree therein as to this court shall seem meet, and as shall be agreeable to equity and good conscience.

The Union Mutual Insurance Company of New York,

*By C. B. G., their attorney.*

C. B. G., counsel.

## XI. BILLS TO CANCEL OR REFORM INSTRUMENTS.<sup>1</sup>

1. *Bill by acceptor against drawers, indorser, and holder, to restrain proceedings at law upon an accommodation bill, and to have same delivered up to be canceled.*<sup>2</sup>

[Title and address.]

Humbly complaining sheweth unto your honors your orator H. B., of, etc., merchant, that your orator previously to the month of —— had frequently accepted bills of exchange for the accommodation of Messrs. D. W. and J. H. W., then of, etc. And that sometime in or about the said month of —— they applied to your orator to assist them with a loan of his acceptance for a sum of money, and they severally assured your orator that if he would accept or indorse a certain bill of exchange for them, the said D. W. and J. H. W., they could procure the same to be discounted, and that they, or one of them, would punctually provide your orator with the money to take up the same. And your orator relying upon such promise agreed to accept such bill of exchange to be drawn upon him by the said D. W., and J. H. W. accordingly drew upon your orator a cer-

<sup>1</sup> Mistake of law is no ground for relief, if it consists of mere ignorance of law on part of complainant. *Allen v. Elder*, 2 Am. St. Rep. 63. But it is otherwise of an honest mistake of law on part of both parties. *Allen v. Elder*, 2 Am. St. Rep. 63.

To reform written instruments on ground of mistake, it must be clearly established, but relief will not be withheld because there is conflicting testimony. *Hutchinson v. Ainsworth*, 2 Am St. Rep. 823.

<sup>2</sup> See *Fuller v. Percival*, 126 Mass. 381, where a firm note fraudulently given by a partner of the plaintiff to a holder with notice of the fraud was canceled. So in an action on a note given for the price of land, defendant may have the note canceled to the extent of the damages sustained by him by reason of false representations in the sale. *Hosleton v. Dickinson*, 51 Iowa, 244.

tain bill of exchange for the sum of two hundred and eighty dollars, dated the —— day of ——, and payable three months after date, which your orator thereupon accepted. And your orator further sheweth unto your honors, that the said bill of exchange having been delivered by your orator to the said D. W. and J. H. W., without any consideration whatsoever had or received by your orator for the same, the said D. W. and J. H. W. ought either to have provided your orator with the money to take up the same when due as they had promised, or else have redelivered the same to your orator to be canceled: and your orator hoped that the said defendants would have provided your orator with the money to take up the said bill of exchange when the same became due, or else would have redelivered the same or caused the same to have been redelivered to your orator to be canceled, and that no proceedings would have been had against your orator to recover the amount thereof as in justice and equity ought to have been the case.

But now so it is, may it please your honors, that the said D. W. and J. H. W., combining and confederating to and with J. J., of, etc., and T. O., of, etc., and with divers other persons etc., they, the said confederates, absolutely refuse to deliver or cause or procure to be delivered up to your orator the said bill of exchange to be canceled, and instead thereof the said T. O. hath got into his possession the said bill, and hath lately commenced an action at law against your orator to recover the amount thereof, the said confederates, or some of them, at times giving out and pretending that the said bill of exchange was made and given by your orator to the said D. W. and J. H. W., for a full valuable consideration or considerations in money.

Whereas your orator expressly charges the contrary thereof to be the truth, and that your orator never had or received any good or valuable consideration or considerations for the said bill of exchange, and that the same was delivered by him to the said D. W. and J. H. W., for their accommodation, without receiving any consideration or considerations for the same, and upon the firm reliance that they, or one of them, would supply your orator with the money to take the said bill up when the same became due and payable; and so the said con-



federates will sometimes admit, but then the said confederate J. J. pretends that he discounted the said bill of exchange for full valuable considerations in money or otherwise at the time when the said bill was indorsed to him, and that when he paid or gave the full valuable consideration or considerations for the same, he had not notice that the said bill had been given by your orator in the manner and upon the express stipulations hereinbefore mentioned, or without a full valuable or any consideration received by your orator for the same, and that therefore your orator ought to pay the amount thereof. And the said J. J. further pretends that he indorsed the said bill of exchange to the said T. O. for good and valuable considerations before he, the said J. J., received any notice from your orator, and before your orator had requested him to deliver up the same. Whereas your orator charges the contrary of all such pretenses to be true, and particularly that the said J. J. did not ever give, pay, or allow to the said D. W. and J. H. W., or either of them, the full value or any consideration whatever, for the said bill of exchange; and that the said J. J. had full notice, or had some reason to know, believe, or suspect that the said bill had been given by your orator to the said D. W. and J. H. W., in the manner and upon the express stipulation hereinbefore mentioned, and without any valuable or other consideration having been received by your orator for the same. And your orator further charges, that the said J. J. received the said bill from the said D. W. and J. H. W., to get the same discounted for them, and with an express undertaking on his part to deliver over the money he obtained upon such bill to them, the said D. W. and J. H. W., but that he never did procure such bill to be discounted, or if he did he applied the moneys he obtained upon the same to his own use, and never paid or delivered over any part thereof to the said D. W. and J. H. W., or either of them. And your orator further charges that the said J. J. hath received notice from your orator and the said D. W. and J. H. W., of the terms upon which the said bill had been obtained by the said D. W. and J. H. W., and had been required by your orator to deliver up the same to him before he, the said J. J., had indorsed the

said bill of exchange to the said T. O., and as evidence thereof your orator expressly charges that the said J. J. had the said bill of exchange in his custody, possession, or power on the ——— day of ———, last past; and that the said J. J. did, on the ——— day of ———, last, offer the said bill of exchange for sale, together with other bills to various persons. And your orator further charges that at the time of the said bill of exchange being indorsed or delivered to the said T. O., and of his paying or giving such consideration or considerations (if any were or was paid by him) he knew or had been informed, or had some reason to know, believe, or suspect that your orator and the said D. W. and J. H. W., had never received the full or any consideration for the said bill of exchange, and he well knew or had been informed that your orator had accepted the said bill of exchange for the accommodation of the said D. W. and J. H. W., without having received any consideration for the same. And your orator further charges, that the said T. O. is a trustee for the said bill of exchange for the said confederate, J. J., or for some other person or persons whose names he refuses to discover, and that he holds the same for the said confederate, J. J., or for such person or persons without having given any consideration or considerations for the same, and that if he receives the amount of the said bill of exchange, or any part thereof, he is to deliver over or pay the same to the said J. J., or such other person or persons, and that he is indemnified by the said J. J., or such other person or persons, from all the costs attending the attempt to recover upon the said bill of exchange on which he has brought his said action at law. And notwithstanding the said T. O. got the said bill of exchange into his possession without giving any consideration for the same, yet he threatens and intends to proceed in his action at law, and in case he should recover judgment, to take out execution against your orator for the amount thereof. And your orator further charges that the said several defendants, or some, or one of them, now have or hath, or lately had in their or one of their custody, possession, or power, some book or books of account, letters, documents, or writings, from which the truth of the several matters and

things aforesaid would appear. And so it would appear if the said defendants would set forth a full, true, and particular account of all such books of account, letters, documents, and writings. All which actings, etc. (*See form No. , p. , interrogating to the stating and charging parts.*) And that the said defendant T. O. may be decreed to deliver up, and the said D. W. and J. H. W. and J. J. be decreed to procure, the said bill of exchange to be delivered up to your orator to be canceled, as having been given by your orator and received by the said D. W. and J. H. W., and the said several defendants without any consideration. And that the said defendants respectively may be restrained by the injunction of this honorable court from proceeding in any action at law already commenced against your orator upon the said bill of exchange, and from commencing any other proceedings at law against your orator upon the said bill of exchange. And that your orator may have such further and other relief in the premises as to your honors shall seem meet, and the nature of this case may require. May it please, etc. (*See forms Nos. , , and pp. , .*) *Pray subpoena and injunction against all the defendants.*

2. *Bill by lessee to have agreement delivered up to be canceled, by which he gave up the remainder of his lease, contrary to his intention, he not being able to read or write; praying also to have the original lease confirmed; also for an account or repayment of the land tax paid by plaintiff, and for an injunction to restrain defendant from proceeding in an action of ejectment commenced by him.*<sup>1</sup>

[*Title and address.*]

Humbly complaining, sheweth unto your honors, the plaintiff W. A., of, etc., that on or about ———, a certain indenture of lease was made and duly executed between E. L., then of, etc., etc., etc., whereby the said E. L. did, etc. [*stating the lease to the plaintiff*], as in and by the said indenture, to which the plaintiff craves leave to refer, when produced to this

<sup>1</sup> 3 Dan. Ch. Prac. \*1961. In *Field v. Herrick*, 5 Bradf. (Ill.) 54, a lease obtained by fraud upon the lessee was canceled. See Pom. Eq. Jur. § 914, and notes.

honorable court will appear. And the plaintiff further sheweth, that he entered upon and possessed the said farm and lands under and by virtue of the said lease; and that the said E. L. departed this life in or about, etc., and that after his death, J. H., of etc., the defendant hereinafter named, became, by purchase or otherwise, seised of or entitled to the possession of the said farm and land, subject to the said lease. And the plaintiff further sheweth that no notice was ever given to the plaintiff to determine or make void the said lease at the end of ——— years from the commencement of the said term of ——— years thereby demised, pursuant to the proviso therein contained or otherwise, but upon the expiration of such ——— years, the said J. H. proposed to the plaintiff to enter into a new agreement as to the said farm and lands, giving the plaintiff to understand that the interest of the plaintiff therein was determined. And the said J. H., upon that occasion, as he had frequently done before, expressed great friendship for the plaintiff, and declared that it was his wish and intention that the plaintiff should continue in possession of his said farm as long as he lived. And the plaintiff further sheweth, that the plaintiff can neither write nor read, and that the plaintiff fully believing that his interest in the said lease was determined, and that the said defendant, who is a man of fortune, was dealing fairly by the plaintiff, and was not intending to take any advantage of him, the plaintiff consented to enter into the new agreement proposed by the said J. H.; and thereupon the said defendant caused such agreement to be reduced into writing by one M. B., and the plaintiff set his mark thereto, but the same was not read once or in any manner explained to him, and such agreement was in the words and figures or to the purport and effect following, that is to say [*to remain one year and pay the land tax, which he was not to pay by his lease*], as in and by said agreement, etc. And the plaintiff further sheweth, that, confiding in the said J. H.'s professions of friendship for the plaintiff, and in his aforesaid declarations that it was his wish that the plaintiff should continue on his said farm as long as the plaintiff lived, the plaintiff proceeded to expend considerable sums of money in erecting new buildings upon the said

farm and lands, and in other improvements thereof. And the plaintiff further sheweth, that in or about, etc., the said J. H. informed the plaintiff that he must either pay an advanced rent of \$——, or deliver up possession of the said premises. And the plaintiff having refused to comply with such unexpected and unjust demand, the said J. H., on or about, etc., caused the plaintiff to be served with a notice to quit the said farm on the —— day of ——. And the plaintiff further sheweth, that after he had received the said notice, the plaintiff having complained to one of his relations of the great hardship of being obliged to quit his farm after he had expended so much money in improving it, in consequence of the said defendant's assurances that the plaintiff should continue on it during his life, and having, in the course of such conversation, mentioned his lease from the said E. L., his said relation desired to see that lease, and upon perusing the same, read to the plaintiff the proviso therein contained, whereby it appeared that the said lease was not to determine at the end of the first —— years, without —— months' previous notice. And the plaintiff further sheweth that he has since, by himself and his agents, repeatedly applied to the said J. H., and requested him to deliver up the said agreement of the —— day of —— to be canceled, and to confirm the said indenture of lease of the —— day of ——, and to return to the plaintiff the land tax, which he has paid in respect of the said farm since the making of the said agreement, and which he was thereby bound to pay, although he was not liable to pay it by the said indenture of lease; with which just and reasonable requests the plaintiff well hoped that the said J. H. would have complied, as in justice and equity he ought to have done. *But now so it is*, etc. And the said J. H. has commenced an action of —— in the —— Court, etc., etc., to obtain possession of the said premises. And the said defendant sometimes pretends that previously to the making of said agreement of the —— day of ——, the said defendant had fully explained to the plaintiff that the plaintiff was entitled to hold the said premises under the said indenture of lease, until the end of the term of —— years therein mentioned, and that the plaintiff was desirous to

surrender and determine the said lease. Whereas the plaintiff expressly charges the contrary thereof to be the truth, and that the said defendant never did in any manner explain to the plaintiff, or give him to understand that he was entitled to hold the said farm until the end of the said term of ——— years. And the defendant well knew at the time of making the said agreement of the ——— day of ———, that the plaintiff would not have entered into the same if he had been aware of his rights under the said indenture of lease, and the said defendant for that reason concealed from the plaintiff that he had such rights. And the plaintiff charges that at the time of making the said agreement the plaintiff had not the advice or assistance of any person whatsoever, but acted therein according to the suggestions of the said defendant, supposing he meant to be kind toward him, and would deal fairly by him. All which actings, etc.

And that the defendant may answer the premises; and that the said agreement, bearing date the ——— day of ———, may be decreed to be delivered up to the plaintiff to be canceled; and that the defendant may confirm the said indenture of lease of the ——— day of ———. And that an account may be taken of what the plaintiff has paid for land tax of the said farm since the making of the said agreement, and that the defendant may be decreed to repay the same to the plaintiff; and that in the mean time the defendant may be restrained by the order and injunction of this honorable court, from proceeding in the said action of ———, and from commencing or prosecuting any other proceedings at law against the plaintiff for recovering possession of the said premises. [*And for further relief, etc.*] May it please, etc.

3. *Bill to reform a conveyance by correcting a mistake in a boundary.*<sup>1</sup>

[*Title and address.*]

Humbly complaining, sheweth unto your honors, the plaintiff.

1. That on the ——— day of ———, 18—, the defendant

<sup>1</sup> The establishment of disputed boundaries has been a matter of equitable cognizance from an early period; but the mere fact that certain boundaries are in controversy is not in itself sufficient to authorize the interference of the court, there being an adequate remedy at law. The court will not interpose to ascertain the boundary unless there is suggested some peculiar equity arising from the conduct, situation, or relations of the parties. Pom. Eq. Jur. § 1384.

executed and delivered to the plaintiff, under this hand and seal, a deed, of which the following is a copy: [*Give a copy, containing, for example, the following description of the premises conveyed: All that certain lot, etc., beginning at a point, etc., running thereon easterly along A Street ——— feet, thence southerly along B Street ——— feet, thence westerly and parallel to C Street ——— feet, thence southerly and parallel to D Street ——— feet, to the place of beginning.*]

2. That the description therein given of the premises intended to be conveyed was erroneous, and in fact does not describe any premises whatever; that the word "southerly," as last used in said description was inserted by mistake of the parties to said deed [*or otherwise, or if fraud is relied upon, the circumstances of it should be specifically stated*], instead of the word "northerly," which should have been used instead thereof; and that in order to make said deed pass any premises whatever to the plaintiff, and to make it conform to the actual intention of the parties, it is necessary that the said description should be rectified and reformed by substituting the word "northerly" for the word "southerly," where the latter word is last used therein [*or say, so as to read as follows, and insert description in full as corrected*].

3. That the plaintiff has paid to the defendant for the said premises the consideration expressed in said deed.

[*Prayer that the deed may be reformed, etc.*]

## XII. BILLS TO RESTRAIN INFRINGEMENTS OF PATENTS, COPYRIGHTS, AND TRADE-MARKS.

1. *Bill by patentee to restrain infringement of patent, after verdict in action at law against same defendant.*<sup>1</sup>

[*Title and address.*]

A. B., of ———, in the district of ———, machinist, brings

1 The equity jurisdiction exercised by the Federal Courts over patents is merely in aid of the common law, in order to give more complete effect to the provisions of the statutes under which the patent is granted. *Sullivan v. Redfield*, 1 Paine (U. S.) 441. When the existence of a patent right is conceded or established by an action at law the jurisdiction of equity to restrain infringement attaches, and under the constitution of the United States is exclusively vested in the Federal Courts. Pom. Eq. Jur. § 1352.

this bill of complaint against C. D., of ———, in the district of ———, carpenter.

And thereupon your orator complains and says, that your orator, a citizen of the United States, being the true and original inventor of a new and useful machine, not known or used before his application for letters patent, did apply to the commissioner of patents of the United States for letters patent for such invention; and having fully and in all respects complied with all the requisitions of law in that behalf, and especially having made oath that he verily believed himself to be the true inventor and discoverer of such machine; and having also paid into the treasury of the United States the sum of thirty dollars, and having presented to the said commissioner a petition setting forth his desire to obtain an exclusive property in the said machine, and praying that letters patent might for that purpose be granted to him; and having also delivered and filed in the patent office a written description of his said invention and discovery, and of the manner of using the same, and accompanied the same with drawings thereof and written references, in such full, clear, and exact terms, as to distinguish the same from all other things before known, and so as to enable any person skilled in the art with which the said invention is most nearly connected, to make and use the same, which said description was duly signed by your orator, and attested by two witnesses: and thereupon letters patent for the said invention in due form of law, under the seal of the patent office of the United States, signed and counter-signed by the proper officers of the United States, and bearing date on the ——— day of ———, A. D. 18—, were granted, issued, and delivered to your orator, whereby was granted and secured to him, his heirs, executors, administrators, and assigns, for the term of fourteen years from the date thereof, the full and exclusive right and liberty of making, constructing, and vending to others to be used, the said machine, which is entitled, in the said letters patent (*state description of invention in words of the patent*); all of which will more fully appear in and by the said letters patent, to which for greater certainty your orator craves leave to refer. And your orator further



shows unto your honors, that heretofore, viz., at the term of this honorable court, begun and holden at ———, within and for the district of ———, on the ——— day of ———, in the year ———, your orator impleaded the said defendant in an action at law, for a violation of the exclusive privilege secured to your orator, by the letters patent aforesaid, by using a machine substantially the same in its construction and mode of operation as the said machine of your orator described in the said letters patent, and thereupon, the said defendant having pleaded that he was not guilty in manner and form as your orator had declared against him, and issue being joined thereon, the cause was committed to a jury, who returned their verdict therein upon oath, and found that the said defendant was guilty in manner and form as your orator had declared against him, and assessed damages in the sum of fifty dollars. And afterwards at the same term of the said court, judgment was rendered on the said verdict in favor of your orator for the aforesaid damages and costs. And your orator has requested the said defendant to desist and refrain from further using the said machine, and to account with and pay to your orator the damages sustained by your orator by reason of the unlawful use of the said machine by the said defendant, or the profits made by such use.

But now so it is, may it please your honors, that the said defendant has used, and still continues to use the said machine, without the license of your orator, and in violation of the right secured by the said letters patent, and refuses to account with and pay over to your orator the profits made by such use; all which is contrary to equity and good conscience.

To the end, therefore, that the said defendant may, if he can, show cause why your orator should not have the relief hereby prayed, and may, upon his oath, and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the several interrogatories hereinafter numbered and set forth, namely: —

1. Whether the said letters patent were granted and issued as above stated?

2. Whether the said action was commenced and prosecuted, and the said verdict recovered, as is above stated?

8. Whether he, the said defendant, has made, used, or sold any of the said machines at any time, and when, either before or since the said trial at law, and if so, how many, and with what profit?

And that the said defendant may answer the premises, and that he may be decreed to account for, and pay over to your orator all such gains and profits as have accrued to him from using, making, or vending the said machine, and that he may be restrained by an injunction issuing out of this honorable court, or issued by one of your honors, according to the form of the statute in such case made and provided, from using, making, or vending any one or more of the said machines, substantially the same in its construction and mode of operation as your orator's machine, described in the said letters patent; and that the machine or machines now in possession of the said defendants, or under their control, may be destroyed or delivered up to your orators; and for such further or other relief as the nature of this case may require, and to your honors may seem meet.

May it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena, etc. (*As in form, No. , ante, p. .*)

2. *Bill to restrain infringement of patent, setting out recoveries at law and in equity.*

[*Title and address.*]

E. H. Jr., of B., in the State of New York, and a citizen of the State of New York, brings this his bill against C. W., of B., in the State of Massachusetts, and a citizen of the State of Massachusetts:—

And thereupon your orator complains and says, that he, being the original and first inventor of a new and useful improvement in sewing machines, fully described in the letters patent issued to him therefor, as hereinafter stated, and not known or used by others before his invention thereof, and not at the time of his application for letters patent therefor, in public use or on sale with his consent or allowance as the inventor; and be-

ing a citizen of the United States, and having made due application, and having fully and in all respects complied with all the requisitions of the law in that behalf, did obtain letters patent therefor, issued in due form of law to him in the name of the United States, and under the seal of the patent office of the United States, and signed by N. P. T., acting secretary of State, and countersigned by H. H. S., acting commissioner of patents, bearing date the tenth day of September, in the year of our Lord eighteen hundred and forty-six, whereby was granted and secured, according to law, to your orator, his heirs, administrators, or assigns, for the term of fourteen years from said date, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement in sewing machines therein specified and claimed, as in and by said letters patent, or a certified copy thereof, here in court to be produced, will more fully appear.

And your orator further shows unto your honors, that certain assignments of certain rights in said patent have been made and duly recorded in the patent office of the United States, whereby your orator, prior to the infringements herein complained of, became and now is the sole owner of said patent; as in and by said assignments, or certified copies thereof here in court to be produced, will more fully appear.

And your orator further shows unto your honors, that the said improvement in sewing machines, patented to him as aforesaid, has hitherto been in the exclusive possession of your orator or his grantees; and has hitherto been and still is of great value and profit to your orator; and that a license fee or patent rent, under his said patent, has hitherto been and still is paid to your orator for the largest portion of all the sewing machines manufactured and sold in the United States; yet the said defendant, well knowing the premises, but contriving how to injure your orator, and without his consent or allowance, and without right, and in violation of said letters patent, and your orator's exclusive rights, secured to him aforesaid, has made, used, or vended, and still does make, use, or vend to others to be used in said district, and in other parts of the

United States, a large number of sewing machines, but how many your orator cannot state, but prays that the defendant may discover and set forth—each embracing substantially the improvement in sewing machines, or a material part thereof, patented to your orator as aforesaid; and thereby the said defendant has infringed, and still does infringe, and cause your orator to fear that in future he will infringe upon the exclusive rights and privileges intended to be secured to your orator in and by his said letters patent.

And your orator further shows unto your honors, that heretofore the validity of his said patent has been uniformly affirmed after severe and repeated contestation; namely, by a verdict and judgment thereon at law, in 1852, and by six final decrees in equity in the Circuit Court of the United States for the district of Massachusetts, and by one final decree in equity in the Circuit Court of the United States for the southern district of New York, all obtained in favor of said patent prior to August, 1854.

And your orator further shows unto your honors, that the sewing machines made and sold by the defendant, as herein complained of, are, in their essential parts and character, substantially like the sewing machines against which injunctions were obtained in the suits aforesaid, by your orator, or by your orator and his then co-owner of said patent.

And your orator has requested the said defendant to desist from making, using, or vending to others to be used, the said sewing machines, embracing the said improvement patented to your orator, and to account with and pay over to your orator the profits made by said defendant by reason of the unlawful making, using, or vending of said sewing machines embracing said patented improvement of your orator. But now so it is, may it please your honors, that said defendant has combined and confederated with other persons, to your orator unknown, but whom, when discovered, your orator prays leave to make defendants hereto, to resist, and destroy the exclusive rights and privileges secured to your orator as aforesaid, and to make, use, and vend said improvement in sewing machines, patented to your orator as aforesaid, without the license of your orator,

and in violation of his just rights in the premises, all of which is contrary to equity and good conscience.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein prayed, and may, under oath, and according to his best and utmost knowledge, remembrance, information, or belief, full, true, direct, and perfect answer make to all and singular the premises, and more especially may answer, discover, and set forth, whether during any and what period of time, and where, he has made, used, and vended to others to be used, for any and what consideration, any, and how many, sewing machines, and whether or not the same embraced the said improvement in sewing machines, or any substantial part thereof, patented to your orator as aforesaid, or how the same differed from your orator's said patent, if at all.

And that the said defendant may answer the premises, and may be decreed to account for and pay over to your orator all gains and profits realized from his unlawful making, using, or vending of sewing machines, embracing said improvement patented to and vested in your orator as aforesaid, and may be restrained by an injunction to be issued out of this honorable court, or by one of your honors, according to law in such case provided, from making, using, or vending any sewing machines embracing said improvement, or any substantial part thereof, patented to your orator as aforesaid, and that the infringing machines, now in the possession or under the control of the defendant, may be delivered up to your orator, or be destroyed; and for such further and other relief in the premises as the nature of the case may require, and to your honors may seem meet.

May it please your honors to grant unto your orator, not only a writ or writs of injunction, conformable to the prayer of this bill, but also a writ or writs of *subpœna* to be directed to the said C. W., and confederates, when discovered, commanding him and them, at a certain time, and under a certain penalty, therein to be limited, personally to be and appear before your honors in this honorable court, then and there to answer unto this bill of complaint, and to do and receive what to your honors shall seem meet in the premises. E. H., JR.

**8. *Bill to restrain infringement of copyright.*<sup>1</sup>**

*[Title and address.]*

The bill of complaint of C. F., T. G. W., and L. T., printers and publishers, and copartners, doing business under the name and style of F., W. & T., and J. S., gentleman, all of C., in the county of M., in said district of Massachusetts, and all being citizens of the United States: That the said J. S. is and heretofore, at the time of the infringement hereinafterwards mentioned, was proprietor of the copyright of a work of which the said J. S. is the author and compiler, entitled, "The Writings of George Washington, being his Correspondence, Addresses, Messages, and other Papers, official and private, selected and published from the original manuscripts, with a Life of the Author, Notes and Illustrations, by J. S.," consisting of twelve volumes, of all which volumes respectively the copyright was taken out by said J. S. previous to the publication thereof respectively, and secured according to law, the said J. S., at the time of taking out and securing said copyrights respectively, and still, being a citizen of the United States, and the term of each and all of which copyrights has still more than eight years to run; and that said F., W. & T., before the infringement hereinafterwards complained of, had, by an agreement with said J. S., undertaken and become interested in and assumed a part of the risk and responsibility of the publication of said work, and have ever since continued, and still continue, to be thus interested, and that ever since the first publication of the several volumes of said work, the public have been supplied with copies of the same by said J. S., and the publishers of the same, at reasonable prices; and that said J. S. and said F., W. & T. have incurred very large expenses upon said publication, and have been and are in the receipt of large amounts, the proceeds of the sale of said work, to re-imburse their expenses, and remunerate their labor and care bestowed upon the same. And your orators further show that they,

<sup>1</sup> State courts have jurisdiction to restrain the unauthorized publication of unpublished manuscript or printed matter in violation of the rights of the person entitled thereto. *Jeane v. Wheatley*, 9 Am. Law Reg. 33; *Folsom v. Marsh*, 2 Story (U. S.) 100; *Grigsby v. Breckenridge*, 3 Bush, 480.

your orators, being in the receipt of large sums, the proceeds of the sale of said work as aforesaid, under said copyrights, B. M., N. C., and T. H. W., all of B., in the county of S., in said district of Massachusetts, and G. P. L., of C., in the county of M., in the district of N. H., booksellers, being copartners under the name, style, and firm of M., C., L. & W., and also C. W. U., of S., in the county of E., in said district of Massachusetts, clerk, all of them well knowing that the said J. S. held such copyrights and said F., W. & T. were interested in the said publication, and deliberately, after due notice, intending to infringe said copyrights at said B., on the fifth day of August, in the year of our Lord eighteen hundred and forty, and at divers times before and since the said fifth day of August, without the allowance and consent of your orators, or either of them, published and exposed to sale and sold a work in two volumes, entitled "The Life of Washington," in the form of an autobiography, the narrative being, to a great extent, conducted by himself in extracts and selections from his own writings, with portraits and other engravings, consisting of ——— pages in the whole, which they still continue to expose to sale, having had due notice, and well knowing that the same is a copy from, and an infringement and piracy of, said "Writings of George Washington, etc., with a Life of the Author," so published by your orators as aforesaid. And your orators aver that three hundred and eighty-eight pages of said piratical work were copied *verbatim et literatim* from the said work so edited and compiled by said J. S. as aforesaid, and so published by your orators as aforesaid, consisting of matter which was published originally by said J. S. under his said copyright, and which had never before been published or printed, and which he, the said J. S., and his assigns, had the exclusive right and privilege to print, publish, and sell and expose to sale; and that many other parts of said piratical work published by said parties complained of, besides said three hundred and eighty-eight pages, are infringements upon said J. S.'s copyrights, whereby your orators have sustained great damage, detriment, and injury. And your orators further show that said M., C., L. & W. and U. still continue and threaten here-

after to continue to print, publish, and expose to sale and sell copies of the said piratical work, the protests, expostulations, and warnings of your orators to them to the contrary notwithstanding. All which actings, doings, and pretenses are contrary to equity and good conscience, and tend to the wrong and injury of your orators in the premises. In consideration whereof, and forasmuch as your orators are remediless in the premises at law, and cannot have adequate relief save in a court of equity, where matters of this and the like nature are properly cognizable and relievable, and to the end that the said M., C. & W. and U. may appear and answer all and singular the matters and things hereinbefore set forth and complained of, particularly how many copies of said piratical work they have sold, and what number they have on hand; and that they be restrained, by injunction issuing from this court, from selling or exposing to sale, or causing, or being in any way concerned in the selling or exposing to sale, or otherwise disposing of any copies of said piratical work, and that they be ordered and decreed to render an account of the copies of the same that they have sold, and to pay over the profits of such sales to the plaintiffs, and that they be ordered to surrender and deliver up the copies on hand and the stereotype plates of said piratical work to an officer of this court to be canceled and destroyed, and be ordered to pay the plaintiffs their costs; and that your orators may have such other and further relief as to this honorable court may seem meet or as equity may require. May it please this honorable court to grant to your orators a writ of *subpœna* directed to the said M., C., L. & W. and U., commanding them at a certain day, and under a certain penalty to be therein inserted, personally to be and appear before this honorable court, then and there to answer the premises, and to stand and abide such order and decree therein as to this honorable court shall seem agreeable to equity and good conscience.

P. & R.

*By their solicitors.*

4. *Dill by the assignee of a copyright to restrain infringement.*

[*Title and address.*]

C. C. Little, of Cambridge, in the district of Massachusetts,



and J. Brown, of Watertown, in the said district, both booksellers and publishers, trading in Boston, in the said district, as copartners, under the style and firm of L. & B., bring their bill against B. B. Muzzey, of Boston, aforesaid, bookseller and publisher.

And thereupon your orators complain and show unto your honors, that in the year one thousand eight hundred and thirty, Octavius Pickering, then of Boston, aforesaid, counselor at law, composed, and printed, and published a certain book, entitled, "Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By Octavius Pickering, Counselor at Law. Volume VIII:" being the eighth volume of a certain series of books, commonly known and called as Pickering's Reports, the title of which said book was duly entered for the securing of the copyright thereof, by the said Octavius Pickering, according to the act of Congress, on the twenty-first day of June, in the year one thousand eight hundred and thirty, in the clerk's office of the District Court of the United States, for Massachusetts district, as by the record of such entry remaining in the said clerk's office fully appears; and your orators aver that thereupon the said Octavius Pickering did all other acts and things required by law for the securing of his said copyright in the book aforesaid, and continued, by his agents, duly authorized, to publish and sell the same exclusively of all other persons, under the protection of the copyright thus secured to him, until his assignment thereof, hereinafter mentioned.

And your orators further show, that in the year one thousand eight hundred and forty-one, the said Octavius Pickering, then of Boston, counselor at law, composed, and printed, and published, a certain other book, entitled, "Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By Octavius Pickering, Counselor at Law. Volume XIX:" being the nineteenth volume of the same series of books commonly known and called as Pickering's Reports, the title of which said book was duly entered, for the securing of the copyright thereof, by the said Octavius Pickering, according to the act of Congress, on the second day of August, in the

year one thousand eight hundred and forty-one, in the clerk's office of the District Court of the United States for the district of Massachusetts, as by the record of such entry remaining in the said clerk's office fully appears; and your orators aver, that thereupon, the said Octavius Pickering did all acts and things required by law for the securing of his said copyright in the book last mentioned, and continued, by his agents duly authorized, to publish and sell the same, exclusively of all other persons, under the protection of the copyright thus secured to him, until the assignment thereof hereinafter mentioned.

And your orators further show, that afterwards, to wit, on the sixth day of December, in the year one thousand eight hundred and forty-four, the said Octavius Pickering, by his deed duly acknowledged and recorded, sold, assigned, and conveyed unto your orators all his right, title, and interest in and to his said copyrights of both the books aforesaid, as by the record of the said deed remaining in the said clerk's office fully appears; and thereupon your orators, as proprietors of the said copyrights, have continued to publish and sell the said books, exclusively of all other persons, until the committing of the grievances hereinafter complained of.

And your orators further show that in the year 1844, Theron Metcalf, of Boston, aforesaid, counselor at law, composed a certain other book, entitled, "Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By Theron Metcalf. Volume V:" and while the same still remained in manuscript, to wit, on the nineteenth day of January, in the year last aforesaid, the said Theron Metcalf, by his deed duly executed, sold, assigned, and transferred to your orators, the manuscript of the said book, with a right to take out a copyright in their own names. And afterwards, to wit, on the eleventh day of March, in the year last aforesaid, your orators having caused the said book to be printed, and being about to publish the same, duly entered the title thereof, for the securing of the copyright thereof, in their own names, as proprietors, according to the act of Congress, in the clerk's office of the District Court of the

United States for Massachusetts district, as by the record of such entry remaining in the said clerk's office fully appears; and your orators aver that thereupon they did all other acts and things required by law, for the securing of their said copyright in the book last aforesaid, and have continued to publish and sell the same, exclusively of all other persons, under the protection of the copyright thus secured to them, until the committing of the grievances hereinafter complained of.

And your orators further show that the exclusive right to print, publish, and sell the several books aforesaid, and the whole and every part of the contents of each of them, was and is vested in your orators; that your orators have expended large sums of money in preparing and printing editions of the said books, and have always had, and still have, a sufficient number of copies of the same on hand for sale to the public at a reasonable price, and have always received, and still ought to receive, the profits thereof.

Nevertheless, the said B. B. M., contriving and intending to injure your orators, without the license or consent of your orators, on the twenty-third day of December, in the year 1847, at his shop in the city of Boston, published and exposed to sale, and sold, and still continues to expose to sale, divers, to wit, fifty copies of a book entitled (*here insert the title of the book complained of, verbatim*); knowing the same had been printed without the consent of your orators; which said book, so exposed to sale, and sold by the said M., is a violation and infringement of the said several copyrights of your orators, in that it contains from the three hundred and twenty-ninth page thereof to the three hundred and thirty-sixth page thereof, inclusive, matter adopted, copied, and taken verbatim, from the aforesaid book of your orators, called the fifth volume of Metcalf's Reports, commencing with the words, "Shaw, C. J. This is a suit in equity," and ending with the words, "distributed according to law"; and, also, in that it contains, from the four hundred and seventeenth page thereof to the four hundred and nineteenth page thereof, inclusive, other matter adopted, copied, and taken verbatim from the aforesaid book of your orators, called the nineteenth volume of

Pickering's Reports, commencing with the words, "Morton, J. When this case was before the court," and ending with the words, "judgment according to the auditor's report"; and, also, in that it contains from the four hundred and twenty-fourth page thereof to the four hundred and twenty-fifth page thereof, inclusive, other matter adopted, copied, and taken verbatim from the aforesaid book of your orators, called the eighth volume of Pickering's Reports, commencing with the words, "Parker, C. J., delivered the opinion of the court," and ending with the words, "Judgment according to verdict"; and, also, in that it contains from the five hundred and fiftieth page thereof to the five hundred and fifty-third page thereof, inclusive, other matter adopted, copied, and taken verbatim from the aforesaid book of your orators, called the fifth volume of Metcalf's Reports, commencing with the words, "To the honorable the House of Representatives," and ending with the words, "Right to vote in any town"; all which said matter, so adopted, copied, and taken in the book, sold, and exposed to sale, by the said M., was first published in the several books, the copyrights of which are now vested in your orators, as aforesaid; and the exclusive right to publish and sell the same, and to take the profits thereof, belongs to your orators by virtue of such copyrights.

And your orators further show, that they are informed and believe, that the said B. B. M. did not print the said book hereinbefore complained of, but that the same was printed and published by certain booksellers in Philadelphia, trading under the style and firm of T. & J. W. J.: that, as soon as your orators were aware that the said book was a violation and infringement of the said several copyrights of your orators, your orators wrote to the said T. & J. W. J. the letter hereto annexed and marked A, to which your orators crave leave to refer as part of this bill, informing them thereof, and that after your orators had thus complained to the said T. & J. W. J. of this infringement, and informed them of your orators' intention to pursue their legal remedy in the premises, the said T. & J. W. J. consigned to the said M. for sale, or sold to the said M., the copies of the said book so published, exposed to sale, or sold by

the said M., at his shop, as aforesaid. And your orators pray that the said M. may discover and set forth, whether he received the said copies from the said T. & J. W. J., and any letter or letters which he may have received from the said T. & J. W. J. concerning them, or the sale thereof.

And your orators further show, that in consequence of the said M. having so exposed to sale and sold, and of his continuing to expose to sale and to sell the book hereinbefore complained of, the sales of your orators' said books have been hindered and rendered less in number than they would otherwise have been ; and that your orators will suffer a still greater diminution of their sales, and a still greater loss of their lawful and rightful profits on their said books, if the said book hereinbefore complained of shall continue to be sold, or exposed to sale, by the said M., or any other person.

All which acts and doings of the said M. are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises. In consideration whereof, and forasmuch as your orators are without adequate remedy, save in a court of equity, your orators pray this honorable court to issue a writ of subpoena in due form of law, and according to the course of this honorable court, directed to the said B. B. M., commanding him at a certain day, and under a certain penalty to be therein specified, to appear before this honorable court, to answer upon oath all and singular the matters and things hereinbefore set forth and complained of, and especially to answer and set forth, —

1. Whether he has sold any and how many copies of the said book hereinbefore complained of, and at what prices, and how many copies thereof he has now on hand?

2. Whether the said book does not contain matter adopted, copied, and taken verbatim from the said eighth and nineteenth volumes of Pickering's Reports, and the said fifth volume of Metcalf's Reports, as hereinbefore specified and described?

3. Whether your orators are not the proprietors of the several copyrights of the said eighth and nineteenth volumes of Pickering's Reports, and the said fifth volume of Metcalf's Reports.

And that the said M. may be restrained by injunction from selling, or exposing to sale, or causing, or being in any way concerned in the selling, or exposing to sale, or otherwise disposing of any other copy or copies of the book hereinbefore complained of; and that he be ordered to render an account of the copies of the same that have been sold, and to pay over the profits of such sales to your orators; and that he be ordered to surrender and deliver up to your orators, all the copies of the said book that he has on hand, and be decreed to pay to your orators their costs in this suit; and that the exclusive right and privilege of your orators to print, publish, and sell their said books, and the matters hereinbefore charged to have been piratically taken from them as aforesaid, may be established, and that your orators may have such other and further relief in the premises as to this honorable court may seem meet, and as the nature and circumstances of the case may require.

5. *Bill for an account and an injunction against illegal use of trade-mark.*<sup>1</sup>

[*Title and address.*]

A. B. and C. D., of ———, and citizens of the State of ———, bring this their bill against E. F., of ———, and a citizen of the State of ———. And thereupon your orators, humbly complaining, show unto your honors that they are the assignees and successors in business of ——— & Co., a firm which was composed of ——— and your orators, and which firm was formerly engaged in the manufacture and sale of sewing machines in ———; and for the period of more than five years your orators and their predecessors had been engaged in the manufacture and sale of sewing machines at the same place; and that during the whole period of time of such manufacture and sale by them, they had exclusively used, and your orators are now so using, and had, and still have, the right so to use, a certain trade-mark for said sewing machines, which trade-mark was

<sup>1</sup> The remedy in equity in these cases does not depend upon any right of *property* in a trade-mark, but upon the broad principle that equity will not permit fraud to be practiced either upon the public or upon private individuals. *Farina v. Silverlock*, 6 De Gex, M. & G. 214-217.

printed on paper of an ultramarine ground, on which is represented a view of the Princess Penelope weaving, and the name "Penelope," which is the essential part of said mark, printed thereon; and that no person, firm, or corporation, except the said ——— and your orators, have had at any time heretofore, and none except your orators now have any right to use the said trade-mark, or any trade-mark essentially the same.

They further show to your honors that on the said ——— day of ———, in the year ———, being entitled as aforesaid to the exclusive use of said trade-mark, and desiring to secure to themselves full and lawful protection for the same by due registration thereof in the United States patent office, according to law, your orators did deposit in said patent office of the United States for registration their trade-mark aforesaid for sewing machines; and having fully complied with all the requirements of the act of Congress in such cases made and provided, the trade-mark aforesaid was on the ——— day of ———, in the year ———, duly and lawfully registered and recorded in said United States patent office, with protection to remain in force for thirty years from said date, all of which, with an accurate copy and description of said trade-mark and the declaration of a member of the firm, on which it was registered, will more fully and at large appear from copies from the patent office, duly certified by ———, commissioner of patents, under his seal of office, and herewith filed as a part of this bill, marked ———; and thereupon protection in the exclusive use of the trade-mark aforesaid previously held and enjoyed by your orators was secured to them for the period of thirty years from said ——— day of ———, in the year ———.

Your orators further respectfully show unto your honors, that since your orators have had the exclusive right to use the said trade-mark, to wit, from the ——— day of ———, in the year ———, to the present time, the said ———, of ———, in the State of ———, has been manufacturing sewing machines in said city of ———, and has been unlawfully and without your orator's consent using, in the sale thereof, a trade-mark substantially like, and indeed almost identical with, that of your orators.

And your orators do further show that they hold and estimate their said trade-mark at the price and value of ——— thousand dollars ; but cannot with certainty state the exact amount of their loss and injury, suffered by reason of said wrongful acts of the defendant, but believe the same to be the full sum of ——— thousand dollars, and do so charge the fact.

To the end, therefore, that your orators may obtain relief in the premises in this honorable court, where alone adequate relief can be afforded, they pray :—

1st. That the said E. F. may be made a defendant to this bill, and compelled to answer each and every allegation thereof, on oath, as fully and to the same extent as if he were directly and particularly interrogated as to each allegation.

2d. That he may be compelled to render before a commissioner of this court, a full, true, and perfect account of all profits of every description which he has made, or might have made, by the use of the simulated trade-mark aforesaid, or by the use of any other trade-mark for sewing machines having thereon as a constituent part thereof the word “ Penelope,” or a representation of the Princess Penelope weaving, or any trade-mark having such near resemblance to that of your orators, as aforesaid, as might be calculated to deceive ; and that he, the said E. F., be decreed to pay over to them all such profits.

3d. That the said commissioner be required to ascertain and report to this court, also, what loss and damage has been inflicted upon your orators by reason of the infringement of their rights, and the interference aforesaid with the right of exclusive use of the trade-mark first above mentioned ; and that the said E. F. be also decreed to pay them such damages.

4th. And may it please your honors to grant unto your orators a restraining order against the said defendant, enjoining and restraining him, his clerks, attorneys, agents, and servants, from using the simulated trade-mark aforesaid, or any other trade-mark containing the word “ Penelope,” or being substantially the same with that of your orators.

5th. And that your orators may obtain the relief prayed for, and all such further or other relief as the nature of their case



may require, may it please your honors to grant to your orators the writ of subpoena against the said E. F., etc.

6. *Bill by foreign manufacturers to restrain the use of their names, trade-marks, envelopes, and labels.*

[*Title and address.*]

J. T. and W. T., of the borough of Leicester, in that part of the United Kingdom of Great Britain and Ireland called England, manufacturers, subjects of Victoria the first, queen of the said kingdom, and aliens to each and all of the United States of America, and the territories and districts thereof, bring this bill of complaint against D. C., of F., in the said district of Massachusetts, manufacturer, a citizen of the said State of Massachusetts. And thereupon the said J. T. and W. T., complaining, say, that for many years past they have been very extensively engaged in manufacturing cotton thread at Leicester aforesaid, and vending the same in large quantities, not only in England but throughout the United States, and in particular in the city of B., in said district. That their said thread is, and for many years has been, put up for sale on spools, and labeled on the top of the spools, "Taylor's Persian Thread" in a circle, in the center of which is the number of the thread, and on the bottom of some of the spools, "J. & W. Taylor, Leicester," and on the bottom of others, "J. & W. Taylor," with the number of yards of thread on each spool, each spool usually containing two hundred yards or three hundred yards of thread, and the spools containing two hundred yards being black and labeled "200 yds." on the bottom of the spool, and those containing three hundred yards being red, and labeled "300 yds." on the bottom of the spools. And on the center of some of the same labels on the bottom of each spool is stamped the symbol or print of the head and forepart of a lion rampant. And on the center of other of said labels is stamped a coat-of-arms, the shield whereon contains a lion rampant, and over the same three balls, with the motto, "*In Deo confido.*" And your orators further say, that their spools so marked, stamped, colored, or labeled as aforesaid, are put up for sale in paper envelopes, each contain-

ing one dozen of spools; which envelopes are prepared and stamped by your orators for said purpose, and some of said envelopes bear in raised letters stamped on them the inscription, "The Persian Thread, made by J. & W. Taylor, is labeled on the top of each spool, Taylor's Persian Thread, and on the bottom J. & W. Taylor, Leicester. The above is for the protection of buyers against certain piratical articles of inferior quality, fraudulently labeled with the name of Taylor." And on other of the said envelopes is stamped a coat-of-arms representing a shield, the upper division of which is gilt, and contains three red balls, and the lower division thereof is red, and contains the effigy of a lion rampant, with the motto under the same, "*In Deo confido.*" Your orators further show unto your honors that their said thread has been and is manufactured of various sizes and numbers, to meet the wants of the trade; and by means of the care, skill, and fidelity with which your orators have conducted the manufacture thereof for a series of years, their said thread has acquired a great reputation in the trade throughout the United States, and large quantities of the same are constantly required from your orators to supply the regular demand for the consumption of the country. And your orators have established agencies for the sale thereof to the wholesale dealers and jobbers in the cities of B., N. Y., P., and N. O., and in addition thereto your orators employ B. W., now residing in the said city of N. Y., as their general agent for the United States, in relation to the sale of their said spool sewing cotton thread; and a mercantile firm of H. & C. are the agents of your orators for the sale of the same in the city of B. And your orators further show unto your honors that their said thread is known and distinguished by the trade and the public as "Taylor's Persian Thread," and that your orators were the original manufacturers thereof, and the first who introduced the same to the public. That your orators' said general agent, on or about the first day of March last past, hearing that complaints were made of the quality of "Taylor's Persian Thread," proceeded to investigate the cause of said complaint, and thereupon ascertained that a spurious article of spool sewing cotton thread was offered for sale by sundry jobbers in the said city

of B., as and for your orators' "Persian Thread," and that such complaints had arisen from the fraudulent imposition of such spurious article upon the public. Your orators further show unto your honors that their said agent further ascertained, upon inquiry, and your orators charge the facts to be, that the said spurious thread so sold and offered for sale in the said city of B., or some of it, was furnished to the said jobbers by said D. C., either by him personally or by one F. D. E., of B., his agent in that behalf, and your orators are informed and believe that the said D. C. has sold the said thread, put up, marked, and designated as aforesaid in the said city of B.; that the said D. C., disregarding the rights of your orators, and fraudulently designing to procure the custom and trade of persons who are in the habit of vending or using your orators' said "Persian Thread," and to induce them and the public to believe that his said thread was in fact manufactured by your orators, has engaged extensively in the manufacture of sewing cotton thread, and caused the same to be put up for sale in envelopes and on spools similar to those used by your orators, and so colored and stamped and labeled as to resemble exactly the said spools and envelopes used by your orators. And the said spool sewing cotton thread, prepared by the said D. C. and sold by him, and which he is engaged in selling as aforesaid, is an exact imitation of the same article which your orators had been manufacturing as aforesaid, and selling in the United States for many years before the said D. C. commenced his said fraudulent imitation thereof. And the said spurious article, although inferior in quality to the genuine Persian Thread manufactured by your orators, can only be distinguished therefrom, so exact is the said D. C.'s imitation as aforesaid, by a careful examination of its quality, and by its falling short in the number of yards contained on each spool from the number marked thereon as the contents thereof. And that the general appearance of the spurious article is the same as that of your orators' genuine thread, and well calculated to deceive those dealing in the purchase and sale thereof. Your orators further show unto your honors that their said general agent has obtained specimens of the said spurious Persian Thread,

so sold by the said D. C. That in some of the specimens thus obtained, the thread is put upon black spools, and in other of said specimens the thread is put upon red spools, and said black and red spools are of the same size and appearance with those used by your orators, on the top of which spurious spools there is pasted a round paper label, partly gilt, on which is printed in a circle the words "Taylor's Persian Thread," and in the center of the circle the number of the thread; and on the other end on the bottom of such spurious spools there is pasted a round paper label, on some of which is printed in a circle the words, "J. & W. Taylor, Leicester," and on others, "J. & W. Taylor," with the number of yards of thread on the spools, and across others of the labels on said black spools the letters and figures "200 yds.," and on said red spools the letters and figures "300 yards" are printed, and in the center of the said labels there is impressed the figure or symbol of the head and forepart of a lion rampant. And in other of said specimens the thread is put on spools corresponding in all particulars to those herein just before described, except that the labels on the bottom thereof bear a coat-of-arms, the center of the shield whereof contains a lion rampant, with three balls over the same, and with the motto under, "*In Deo confido.*" Your orators have also obtained specimens of the envelopes in which said D. C.'s spurious thread is put up and sold by him or his agents, which bear the same inscriptions, letters, and stamps that those used and employed by your orators bear. And in all these particulars of the labels on each end of the said spurious spools of thread, and the envelopes in which they are put up, they are exactly like the envelopes and the labels on the respective ends of the spools of your orators' genuine Persian Thread, as hereinbefore stated. Your orators further show unto your honors that they have not yet ascertained the extent to which the said D. C. has carried his said fraudulent imitation and sale of your orators' said thread. But your orators' said general agent has found the same offered for sale to the trade in at least six wholesale or jobbing houses in the city of B., as Taylor's Persian Thread; from which your orators believe, and they therefore charge, on their belief, that the said D. C.

has been and is engaged in selling his said fraudulent and spurious imitation of your orators' Persian Thread to a large extent in various places in the United States, with intent that the same should circulate and be received and used by the public as Taylor's genuine Persian Thread. And your orators further show unto your honors that the fraudulent and inequitable conduct of the said D. C. is not only injuring them in the sales of their said genuine Persian Thread, and the profits which they would otherwise reasonably make thereon; but by the inferior quality and false measure of the said spurious Persian Thread is greatly prejudicing the reputation of your orators' said Persian Thread in the market, and unless the said imitation is discontinued or prevented, will ultimately destroy the character and standing of the genuine article. And your orators also charge that the said spurious article is a fraud and deception upon such of the citizens of the State of Massachusetts, and of the United States, as purchase the same, believing it to be the genuine article manufactured by your orators. And your orators further show unto your honors, that in the month of March last past, having discovered a portion of the aforesaid fraudulent conduct of the said D. C., your orators did file their bill of complaint before the chancellor of the State of New York, wherein they set forth many of the facts which are in substance hereinbefore stated, and prayed for an injunction to restrain the said D. C. from the aforesaid fraudulent use of the name and trade-marks of your orators, and the same was granted by the court; and the said D. C. having appeared and filed his answer to the said bill, did therein admit that he had used the name and trade-marks of your orators in manner set forth in the bill aforesaid; but denied that the article manufactured by him was of inferior quality to that manufactured by your orators; and afterwards an application was made to the chancellor to dissolve the injunction aforesaid, which last-mentioned motion is now before the said chancellor, and by reason of the great number of causes depending before him, the aforesaid cause cannot be decided without great delay. And your orators are informed and believe it to be true that the said D. C., residing out of the juris-

diction of the chancellor of the State of New York, can, with impunity, disregard the injunction aforesaid, and that he has continued to make sale in the city of B. and elsewhere of the said thread, put up, marked, labeled, and appearing precisely like that made, put up, and sold by your orators, and your orators continue to be greatly injured thereby. In consideration whereof, and forasmuch as your orators are remediless in the premises at common law, and cannot have adequate relief, save by the aid and interposition of this court, to the end, therefore, that the said D. C., if he can show why your orators should not have the relief hereby prayed, and may upon his corporal oath, and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the several interrogatories hereinafter numbered and set forth; and the said D. C., and his attorneys, solicitors, counselors, agents, and servants, may be enjoined and restrained from manufacturing, selling, or offering for sale, directly or indirectly, any spool cotton sewing thread manufactured by him, or any person other than your orators, under the denomination of "Taylor's Persian Thread," or on spools with the words "Taylor's Persian Thread," or "J. & W. Taylor, Leicester," or "J. & W. Taylor," printed, painted, written, or stamped, or attached or pasted thereon, or with your orators' said device of a lion rampant, or with their said coat-of-arms thereon; or on spools so made or having any label, printing, or device thereon, in such manner as to be colorable imitations of your orators' said spool thread, usually known as "Taylor's Persian Thread"; and that the said D. C. may be decreed to account to your orators for all the profits which he has made by the sale of his said fraudulent imitation of your orators' thread, and all the profits which your orators would have made on the sales of their genuine thread, but for the said D. C.'s inequitable and wanton piracy of their said name, spools, and labels; and that your orators may have their costs and charges in this behalf paid by the said D. C.; and that your orators may have such further and other relief in the premises as to your honors shall seem meet, and shall be agreeable to equity and good conscience. May it

please your honors to grant unto your orators a writ of injunction, issuing out of and under the seal of this court, to be directed to the said D. C., his attorneys, solicitors, counselors, agents, and servants, therein and thereby commanding and enjoining them, under a certain penalty in the said writ to be expressed, according to the foregoing prayer of your orators. May it also please your honors to grant unto your orators a writ of *subpœna*, issuing out of and under the seal of this court, to be directed to the said D. C., commanding him on a certain day, and under a certain penalty in the said writ to be inserted, personally to be and appear before your honors in this honorable court, then and there to answer the premises, and to stand to, abide by, and perform such order and decree therein as to your honors shall seem meet, and shall be agreeable to equity and good conscience.

C. P. C., of Counsel.

J. & W. T.,

C. P. & B. R. C.,

By W. B., *their Agent and Attorney.*

*Solicitors.*

UNITED STATES OF AMERICA, }  
DISTRICT OF MASSACHUSETTS. } *ss.*

Personally appeared before me the above-named W. B., on this second day of December, A. D. 1843, and made oath that this bill in equity by him signed, in as far as it states matters within his knowledge, is true to his knowledge, and in as far as it states matters within his belief, is true to his best belief.

W. W. S., Commissioner, etc.

Interrogatories to be answered by D. C.:—

1. Whether or not have you manufactured and sold in Massachusetts, or elsewhere, thread put upon black spools, on one end of each of which spools is pasted, or otherwise fastened, a circular paper label, partly gilt, on which is printed in a circle the words "Taylor's Persian Thread," and in the center thereof the number of the thread, and on the other end of each of said spools is pasted or otherwise fastened a circular white paper label, on which is printed in a circle the words "J. & W. Taylor, Leicester," and across the same label "200 yds.," and in the

center of the same label there is impressed the figure or symbol of a lion rampant?

2. Whether or not have you manufactured and sold in Massachusetts, or elsewhere, thread put upon red spools, corresponding in all respects to the black spools described in the preceding interrogatory, except in the color of the spool and in the quantity of thread thereon; and in the letters and figures "300 yds." printed across the said white paper label?

3. What number of each kind of the said spools of thread have you manufactured and sold? State the same accurately, and distinguish the kind and number of the thread, and the number of black spools and the number of red spools so sold by you since you commenced selling the same, and the times when and the places where the same have been sold.

4. What have been the profits made or realized by you on the manufacture and sale of thread put upon spools colored, decorated, and fitted up in the manner described in the first and second interrogatories?

5. To whom and what persons in particular have you sold the said thread put up in the manner described in the first and second interrogatories?

6. Who is, and who has been, your agent in Boston for the sale of your thread put upon spools fitted up in the manner described in the first and second interrogatories?

7. Whether or not did you admit in an answer signed, sworn to, and filed by you in the court of chancery in and for the State of New York, to a bill of complaint therein pending, wherein the said J. T. and W. T. are complainants, and yourself is defendant, that you have engaged in the manufacture of sewing cotton thread, which you have caused to be put up for sale on spools similar to those used by the complainants, and so colored, stamped, and labeled as to resemble exactly, or as nearly as the same could be done, the said spools used by the complainants, and the said spool sewing cotton, which has been prepared and sold by you, is an exact imitation of the same article which the complainants had been selling in the United States many years before you commenced manufacturing your thread?



8. Whether or not have you manufactured and sold in Massachusetts sewing cotton thread upon black spools and upon red spools, on one end of each of which is fastened a circular paper label, described as in interrogatory numbered 1, and on the other end is fastened a circular paper label on which is stamped a coat-of-arms, the shield whereof contains a lion rampant, and over the same three balls, with the motto under the shield, "*In Deo confido*," and around said shield is printed in some of said labels, "J. & W. Taylor, Leicester," and in others, "J. & W. Taylor," with the number of yards on said spools?

9. Whether or no have you put up and sold your sewing cotton thread, colored, stamped, and labeled in all or some of the modes described in this bill in envelopes or wrappers, some bearing in raised letters the inscription, "The Persian Thread, made by J. & W. Taylor, is labeled on the top of each spool, Taylor's Persian Thread, and on the bottom, J. & W. Taylor, Leicester. The above is for the protection of buyers against certain piratical articles of inferior quality, fraudulently labeled with the name of Taylor," and others bearing a coat-of-arms, the upper division of which is guilt, and has three red balls thereon, and the lower division is red, and has a lion rampant thereon?

C. P. and B. R. O., *Solicitors*.

### XIII. CREDITORS' BILLS.<sup>1</sup>

#### 1. *Bill by simple contract creditors against executors of deceased debtor, for payment of his debts.*

Humbly complaining, show unto your honors your orator W. B., of, etc., and C. D., of, etc., creditors by simple contract of J. F., late of, etc., deceased, on behalf of themselves and all other, the creditors of the said J. F., who shall come in and

<sup>1</sup> The origin of the jurisdiction was in the narrowness of common-law remedies by writs of execution, which were confined to those estates and interests recognized by the law, and did not extend to those which were equitable in their nature; but statutes both in England and in many of the States have greatly extended the scope of writs of execution so as to afford an adequate remedy in cases where formerly the party was compelled to resort to a creditor's bill. Where the remedy still exists, a judgment must first be obtained, and certain steps taken towards enforcing it before a bill can be filed. See Pom. Eq. Jur. § 1415.

seek relief by and contribute to the expense of this suit, that the said J. F., at the time of his death, was justly and truly indebted unto your orator W. B., in the sum of \$——— and upwards, for goods sold and delivered, and moneys paid, laid out, and expended to and for his use, and that the said J. F. was also justly and truly indebted to your orator C. D. in the sum of \$——— and upwards, for, etc. And your orators further show unto your honors, that the said J. F., in his lifetime, and at the time of his death, was possessed of, or well entitled unto a considerable personal estate, and being so possessed, departed this life on or about ——, having first duly made his last will, bearing date, etc., and thereby appointed J. M. and C. S. (the defendants hereinafter named), the executors thereof, as in and by the said will, or the probate thereof, to which your orators crave leave to refer when produced to this honorable court will appear. And your orators further show unto your honors that the said J. M. and J. S. duly proved the said will in the proper court, and undertook the executorship thereof, and possessed themselves of the personal estate and effects of the said testator to a very considerable amount, and more than sufficient to satisfy his just debts and funeral expenses. And your orators further show unto your honors that the said J. M. and C. S., having possessed themselves of the said testator's personal estate and effects as aforesaid, your orators have made and caused to be made several applications to them, the said J. M. and C. S., and requested them to pay and satisfy unto your orators their respective demands, with which just and reasonable requests your orators well hoped that the said J. M. and C. S. would have complied as in justice and equity they ought to have done. But now so it is, etc. And the said defendants pretend that the said testator's personal estate was small and inconsiderable, and hath already been exhausted in the payment of his funeral expenses and just debts. Whereas your orators charge that the said testator's personal estates and effects were more than sufficient to discharge all his just debts and funeral expenses, and so it would appear if the said defendants would set forth a full, true, and particular account of all and every the personal estate and effects of the said tes-

tator come to their, or either of their, hands or use, and also a full, true, and particular account of the manner in which they have disposed of or applied the same, but which they refuse to do. All which actings, etc. (*See form No. vi., p. 327, interrogating to the stating and charging parts.*) And that an account may be taken of the moneys due to your orators in respect of their said several demands, and of other the debts owing by the said J. F. at the time of his death; and that if the said defendants shall not admit assets of the said testator, then that an account may also be taken of the personal estate and effects of the said testator possessed or received by, or by the order or for the use of the said defendants, or either of them, and that such personal estate may be applied in a due course of administration. And that your orators and the said other unsatisfied creditors by simple contract of the said testator may have such further or other relief in the premises as to your honors shall seem meet, and the circumstances of this case may require. May it please, etc.

*Pray subpoena against J. M. and C. S.*

**2. Creditors' bill against a corporation and its stockholders, stating the grounds on which they are liable under the statutes of Massachusetts.<sup>1</sup>**

[*Title and address.*]

Humbly complaining, show the plaintiffs, the Essex Company, a corporation duly established under the laws of this commonwealth, having its place of business at L., in the county of E., on behalf of themselves and all the other unsatisfied creditors of the defendant corporation hereinafter named, who shall come in and contribute to the expenses of this suit, that by an act of the legislature of this commonwealth, approved the twenty-sixth day of March, in the year 1852, J. W. E., and others, with their associates, were authorized to organize a corporation by the name of the Lawrence Machine Shop, for the purpose of manufacturing machinery in said L., with a capital stock not exceeding seven hundred and fifty thousand dollars; that thereupon, on the ——— day of ———, under and

<sup>1</sup> Essex Company v. Lawrence Machine Shop, 10 Allen, 352.

by virtue of said act, the said Lawrence Machine Shop was duly organized, and then became and was a manufacturing corporation under the laws of this commonwealth, having its work established at L. aforesaid.

And the plaintiffs further show, that the capital stock of said corporation was fixed and limited by said corporation at seven hundred and fifty thousand dollars; and that on the twenty-seventh day of January, in the year 1853, and before the whole amount of the capital stock fixed and limited by said corporation had been fully paid in, and before any certificate thereof had been made and recorded as prescribed by law, the said Lawrence Machine Shop, by G. McK., its treasurer, duly authorized thereto, made and delivered to the plaintiffs three several promissory notes in writing, dated the said twenty-seventh day of January, one for the sum of fifty thousand dollars, the other two for fifteen thousand dollars each, and thereby, for value received, promised the plaintiffs to pay to them or their order the amount of said notes, to wit, eighty thousand dollars, on the fifteenth day of January, in the year 1858, with interest from the fifteenth day of January, of the year 1853, copies of which notes, with the indorsements thereon, are set out in the copy of judgment hereto annexed.

And the plaintiffs further show, that, at the time the said Lawrence Machine Shop made and delivered said notes to the plaintiffs, and from the time of its incorporation and organization until the twenty-first day of February, in the year 1857, the said Lawrence Machine Shop had not given notice annually as required by the laws of this commonwealth, in some newspaper printed in the county where the works of said corporation were established, to wit, the county of E., or in any newspaper printed in any other county, of the amount of all assessments voted by the corporation, and actually paid in; nor had it given notice in any newspaper of the amount of all existing debts due from said corporation.

And the plaintiffs further show, that from the time of the incorporation and organization of the said Lawrence Machine Shop to the time said corporation made and delivered said notes to the plaintiffs, and for a long time thereafter, the cap-

ital stock fixed and limited by said corporation as aforesaid, had not been fully paid in; nor has there, from the time of its organization to the present time, been any certificate of the payment of said capital stock made and recorded by said corporation as by law provided.

And the plaintiffs further show that on, to wit, the fourth day of August, in the year 1862, they commenced a suit against the said Lawrence Machine Shop upon the aforesaid notes, returnable to the ——— Court, then next to be holden at N., within and for the said county of E., on the first Monday of September, in the year 1862, and duly entered said suit in said court, and there prosecuted the same to judgment. And at said term of the said court, on, to wit, the twenty-first day of October, in the year 1862, by consideration of the justice of said ——— Court, judgment was rendered in said suit against said Lawrence Machine Shop in favor of the plaintiffs for the sum of \$37,747.62 debt, and \$15.89 costs of suit, and execution was thereupon issued by said ——— Court, on, to wit, the twenty-fifth day of said October, against said Lawrence Machine Shop in favor of the plaintiffs for the said sum of \$37,747.62 debt, and \$15.89 costs of suit; copies of which judgment, execution, and officer's return upon said execution are hereto annexed.

And the plaintiffs further show, that on, to wit, the said twenty-fifth day of October, A. D. 1862, the day of issuing said execution, they placed for collection said execution in the hands of one A. F. N., a deputy sheriff, qualified to collect, serve, and return said execution. And the said deputy sheriff, on, to wit, the third day of November, A. D. 1862, made demand upon the said Lawrence Machine Shop for the payment of the amount due to the plaintiffs; and for which judgment and execution had been rendered and issued in said suit as aforesaid.

And the plaintiffs show that the Lawrence Machine Shop did neglect, for the space of thirty days after said demand by said deputy sheriff, holding said execution, to exhibit to said deputy sheriff real or personal estate belonging to said corporation, subject to be taken on execution, sufficient to satisfy said execution, or any part thereof. And the said corporation has never exhibited to said deputy sheriff any estate, real or personal,

from which he might satisfy said execution in whole or in part; and the said corporation has ever since neglected and refused to pay the same, or any part thereof; and the said deputy sheriff duly returned said execution into the clerk's office of said \_\_\_\_\_ Court, at S., in said county of E., in no part satisfied; and there is now due to the plaintiffs upon said judgment, rendered upon said notes, the said sum of \$37,747.62 debt, and \$15.89 costs of suit, making in all \$37,763.51, with interest from the said twenty-first day of October, A. D. 1862, the day of the date of said judgment.

And the plaintiffs further show that at the time when said judgment debt was contracted, on, to wit, the twenty-seventh day of January, in the year 1853, the day of the date of said notes, and during the time from and after the said twenty-seventh day of January, A. D. 1853, and before the capital stock of said corporation, fixed and limited as aforesaid, was fully paid in, and before any certificate that said capital stock had been paid in was made and recorded, as by law required, and from and after the said twenty-seventh day of January, A. D. 1853, and before any notice of the assessments voted by said corporation and actually paid in had been given, in any newspaper printed in said county of E., or printed in any other county; and from and after said twenty-seventh day of January, A. D. 1853, and before any notice of the amount of all existing debts due from said corporation had been given in any such newspaper as by law required, and at the time when your orators commenced their suit aforesaid against the said Lawrence Machine Shop, and in which judgment aforesaid was rendered, the following named persons became, and were, stockholders in the said Lawrence Machine Shop, each holding stock therein of the amount and number of shares set against their respective names:—

T. A., of L., county of M., holder of \_\_\_\_\_ shares, par value \$\_\_\_\_\_

E. B., of B., county of S., holder of \_\_\_\_\_ shares, par value \$\_\_\_\_\_

Etc., etc.

Wherefore the plaintiffs, in behalf of themselves and the

aforesaid other creditors of the said Lawrence Machine Shop, bring the foregoing bill against said Lawrence Machine Shop, and the aforesaid stockholders therein, and pray that the aforesaid stockholders may be ordered and decreed to pay to the plaintiffs the amount due them as aforesaid, as fixed and determined by the judgment aforesaid, with interest from the date of said judgment, and to pay such other creditors of the said corporation as may become parties to this bill such sums as may be found due to such creditors; and that the amount of the debt due as aforesaid to the plaintiffs from said Lawrence Machine Shop, and such as may be found due to such other creditors as may become parties hereto, may be assessed upon said stockholders as law and equity may require.

And that the plaintiffs may have such orders, decrees, and process as may be necessary to enforce the payment of such sums as may be assessed upon said stockholders, and may have such further and other relief in the premises as the nature and circumstances of the case may require, and as shall seem meet unto this honorable court.

May it please your honors to grant unto the plaintiffs a writ of *subpœna*, to be directed to the said Lawrence Machine Shop, and the said stockholders in this bill named, thereby commanding them at a certain day, and under certain penalties therein expressed, personally to appear before this honorable court, and then and there full, true, direct, and perfect answers make to all and singular the premises: and further, to stand to, perform, and abide such further orders, directions, and decrees therein as to this honorable court shall seem meet.

THE ESSEX COMPANY, *by its Treasurer*, C. S. S.

D. S., Jun.

J. J. S., *Solicitors and of Counsel*.

#### XIV. BILL FOR DOWER.<sup>1</sup>

##### 1. *Bill by a widow against the heir for dower.*

[*Title and address.*]

Humbly complaining, sheweth unto your honors your oratrix

<sup>1</sup> Anciently the right to dower was enforced through the writ of dower and the writ of dower *unde nihil habet*; but the Chancery

L. C., of, etc., that P. C., the late husband of your oratrix, was in his lifetime, and during the time he was married to your oratrix, seised in fee-simple, or fæe-tail, of divers freehold estates, and being so seised, the said P. C. departed this life on or about the —— day of ——, leaving your oratrix his widow, and F. C., his nephew and heir-at-law (the defendant hereinafter named), him surviving; whereby your oratrix became by law entitled to her dower in the said freehold estates; but upon, or soon after, the decease of the said P. C., the said F. C., as his heir-at-law, or otherwise, entered and took possession thereof, and of all the title deeds, evidences, and writings relative thereto; and your oratrix has frequently, by herself and otherwise, applied to the said F. C. and requested him to discover the said freehold estates, of which the said P. C. died seised, and his title thereto, and to account for and pay to your oratrix one-third part of the rent and profits of such freehold, which your oratrix is entitled to, in respect of her dower, since the death of the said P. C., and to assign to and let your oratrix into the absolute possession and enjoyment of one-third part of such freehold, which your oratrix hoped he would have done. But now so it is, the said F. C. refuses to comply therewith, pretending that your oratrix was never accoupled to the said P. C. in lawful matrimony. Whereas your oratrix charges, that on, etc., at ——, in the county of ——, at the parish of ——, was duly married to your oratrix, and that she is

Courts began to assume jurisdiction of cases of dower in the time of Elizabeth. Since the statutes 3 and 4 William IV. ch. 105, and since an early day in this country, equity has assumed exclusive jurisdiction of claims for dower in equitable estates. *McMahan v. Kimball*, 3 Blackf. 1. Where the husband's estate was an equity of redemption the widow may proceed against the mortgagee by a bill in equity to redeem. *Dawson v. Bank of White Haven*, L. R. 4 C. D. 639; *Gibson v. Crehore*, 3 Pick. 475; *Farwell v. Cotting*, 8 Allen, 211; *Chiswell v. Morris*, 1 McCart. 101. Where the husband dies possessed of land on which a part of the purchase money is due, the widow may resort to equity for a sale of the land in satisfaction of the unpaid balance and for her dower in the surplus. *Danton v. Nanny*, 8 Barb. 618; *Thompson v. Cochran*, 7 Humph. 72; *Daniel v. Leitch*, 13 Gratt. 195. On the conversion of the husband's estate into money, equity will award to the widow her proportionate share. *In re Hall's Estate*, L. R. 9 Eq. 179; *Lawrence v. Miller*, 1 Sandf. 516; *Higbie v. Westlake*, 14 N. Y. 281. And where the husband seeks by a fraudulent conveyance to destroy the widow's dower, equity will grant the proportionate relief. *Swaine v. Perine*, 5 Johns. Ch. 482; *Holmes v. Holmes*, 3 Paige, 363; *Petty v. Petty*, 4 Mon. B. 215; *London v. London*, 1 Humph. 1.



therefore entitled to her dower, as aforesaid ; but the said F. C. refuses to discover the said freehold premises, which are subject thereto, or to produce the title deeds, evidences, and writings, or any of them, relative to the said freehold estates, wherefore your oratrix is unable to proceed at law to establish her said demand. And that the said F. C. may discover and set forth in manner aforesaid a full and true description of such freehold estates as aforesaid, with all the circumstances and particulars thereof, or relative thereto. And that an account may be taken, by and under the decree and direction of this honorable court, of the rents and profits of the said freehold estates, wherein your oratrix is dowable, which have accrued since the death of the said P. C., and have, or might have been received by the said F. C.; and that one-third part thereof, arising from the said freehold estates, may be paid to her ; and that one-third part of such freehold estates may be assigned and set out to her for her dower, and your oratrix let into the full and immediate possession and enjoyment thereof, and decreed to hold the same for her life. And that the said F. C. may be decreed to produce all title deeds, evidences, and writings, relative to the said freehold estates, in order to effectuate the purposes aforesaid. [*And for general relief.*] May it please, etc. [*End by praying process of subpoena against the said F. C.*]

2. *Bill for dower, and to set aside release thereof for fraud and imposition.*<sup>1</sup>

[*Title and address.*]

Humbly complaining, show unto this honorable court, your orator Ellick P., of Cincinnati, in the State of Ohio, Esq., and a citizen of the said State of Ohio, and your oratrix Elizabeth P., now the wife of the said Ellick P., of said Cincinnati, and a citizen of the said State of Ohio, gentlewoman, that the said Elizabeth, who was the widow of R. M., late of M., in the said commonwealth of Massachusetts, deceased, intestate, wherein the said Ellick and Elizabeth demanded against the Monson and Brimfield Manufacturing Company, duly and legally incor-

1 Powell and Wife v. Monson, etc. Manuf. Co. 3 Mason (U. S.) 247.

porated by that name within the said commonwealth of Massachusetts, the reasonable or just third part whereof the said Elizabeth is by law dowable according to the true intendment of law, of, and in the following described lands or tenements bounded and described as follows, to wit: [*Description and boundaries.*]

Whereupon your said orator and oratrix complain and say that the said R. M., formerly the husband of your said oratrix, was seised in his demesne as of fee of the aforesaid described lands and tenements during the coverture of the said R. M., with her, your said oratrix, and while she was his wife and was actually in possession thereof.

And your said orator and oratrix further say, that they at said M., on the third day of March, A. D. 1823, did make demand and require of the said Monson and Brimfield Manufacturing Company, who then did and now do claim a right of freehold and inheritance in the before described premises, to assign and set out to her, your said oratrix, her dower or just third part of and in the aforesaid premises.

And your orator and oratrix further say, that since the time of making said demand as aforesaid more than one month hath elapsed, and that the said Monson and Brimfield Manufacturing Company did not within one month next after said demand being made as aforesaid, assign and set out to your oratrix her dower, or any part thereof in the aforesaid premises, and that the said Monson and Brimfield Manufacturing Company, or either of the members thereof, have not done, or caused the same to be done, at any time since, but, on the contrary, they then refused and still refuse so to do.

But now so it is, may it please your honors, that the said Monson and Brimfield Manufacturing Company, being in no-wise ignorant of the premises, but contriving and confederating with each other, and with several other persons to your orator and oratrix yet unknown, in order to wrong and injure your said orator and oratrix, and to prevent your oratrix from having her dower or just third part of and in the aforesaid premises assigned and set out to her according to the true intendment of law, etc., etc.

Your orator and oratrix give your honors to be informed that the said confederates pretend and give out that the said oratrix, during her coverture, and while she was the wife of the said R. M., did sign, seal, and deliver some deed, or other instrument in writing, whereby she acquitted, released, and discharged all her right of dower in the aforesaid described premises.

Now your orator and oratrix charge the contrary thereof to be true, and, moreover, that the said oratrix never did make any such release or discharge to them, the said Monson and Brimfield Manufacturing Company, as hereinbefore pretended, or if she did give or execute the same, she was grossly deceived and imposed upon in relation thereto, and that the same was obtained from her, or she was prevailed upon to execute the same by unfair means or practices used in that behalf by the said confederates.

And your orator and oratrix further charge and complain that the said pretended release or instrument was procured and brought to the said oratrix, ready drawn and prepared for execution, and that she would not have signed or executed the same, in case she had known or been fully appraised of the real purport, tenor, or contents thereof, nor was any sum or sums of money whatever paid to or received by her, as the consideration for her executing the said pretended release or instrument. Under the circumstances aforesaid, your said orator and oratrix insist that the said pretended release or instrument ought to be delivered up to be canceled, as having been fraudulently and unfairly, and without consideration, obtained from the said oratrix.

But nevertheless the said confederates insist upon the contrary, and claim the full benefit of the said pretended release or instrument, and threaten and intend, in case your orator and oratrix proceed at law against them touching the matters aforesaid, to set up the pretended release or instrument in bar thereto.

And also, your orator and oratrix here before your honors insist that the said pretended deed or instrument, in manner and form as the same was signed, sealed, and delivered, was

not a discharge or relinquishment of dower of your oratrix in the premises therein referred to, and that the same by the laws of the land does not bar or exclude her from such dower or right in the within described lands or tenements.

And your orator and oratrix further complain, and give your honors to be informed, that the said confederates pretend that your oratrix, during the lifetime of her late husband, R. M., and while she was his wife as aforesaid, did join with her said husband in the several deeds of sale and conveyance by him made, of the said several pieces of land as hereinbefore described, and that your oratrix, by such joining in the aforesaid deeds of sale and conveyance, has lawfully barred or excluded herself from such dower or right. Now your orator and oratrix, on the contrary charge and say, that your oratrix did not join with her said husband, R. M., in any deed of sale or conveyance of the before described premises, as they pretend, and that she is not, by the laws of the land, barred or excluded from her said dower or right in or to the within described lands or tenements.

In consideration of all which, and inasmuch as your orator and oratrix cannot have relief in the premises by the plain, direct, and ordinary course of the common law, to the end, therefore, that the said Monson and Brimfield Manufacturing Company, and the rest of the confederates, when discovered, may be holden to account with, or assign and set out to, your orator her dower or just third part in or to the within described premises, your orator and oratrix humbly pray that W. P., E. T. A., J. H., S. W. Jr., G. B., B. S., S. C., and G. T., all of B., in the said district of Massachusetts, gentlemen, W. B., of C., in the said district, gentleman, and J. H. Jr., of M., in said district, gentleman, all being proprietors and constituting the Monson and Brimfield Manufacturing Company, and citizens of the said State of Massachusetts; and such other confederates, when discovered, may be called and required severally to answer on oath, fully and particularly, all and singular, the matters herein set forth.

Wherefore, may it please your honors, etc.

G. B.

[*Prayer for subpoena.*]

XV. FORECLOSURE BILLS.<sup>1</sup>1. *Bill by mortgagee against mortgagor for sale of mortgaged premises.*<sup>2</sup>

[Title and address.]

The bill of complaint of ———, of ——— County, humbly shows, that heretofore, to wit, on the ——— day of ———, in the year ———, a certain ———, of said county, being indebted unto your orator in the sum ———, current money, and intending to secure the payment thereof unto your orator, did, by his deed of that date, convey unto your orator and his heirs certain real estate lying in said county, and particularly described in said deed, to which said deed there is a condition annexed that it be void on payment by said ——— to your orator of the aforesaid sum of money, with interest thereon from ———, on or before the ——— day of ———, in the year ———, as by a copy of said deed filed herewith as a part of this bill will more fully appear.

And your orator charges that no part of the aforesaid sum of money, or the interest accruing thereon, has been paid, but the same is still owing to him, although the time limited for the payment thereof by the condition aforesaid has passed, and payment thereof has been duly demanded of the said ———.<sup>3</sup>

To the end, therefore, that the said ——— may answer the several matters and things hereinbefore stated, as fully and particularly as if they were herein again repeated, and he was thereunto specially interrogated;<sup>4</sup> and that the premises aforesaid, or

1 Equity deals primarily and almost exclusively with the mortgagee. His interest in the mortgage is no longer an estate but a mere lien, an appendage of the debt, personal assets, a thing in action signable with the debt, but incapable of being separated from the debt, and transferred by itself. He has no legal remedy on the mortgage, and can enforce the lien against the land only in equity, as this is the primary object of a foreclosure suit, which does not vest the title in the mortgagee, although it extinguishes that of the mortgagor by transferring it to the purchaser at the judicial sale. Pom. Eq. Jur. § 1190.

2 From Milf. & Tyl. Pl. & Pr. p. 511.

3 If payments have been made on account, they should be admitted in the bill, either specially, or by referring to some statement or account accompanying the bill, as in the following forms.

4 A defendant is bound, upon a general interrogatory or prayer, to answer all the material averments in the bill fully and explicitly. In cases, therefore, where it is expected that there will be no contro-

so much thereof as may be necessary, may be sold for payment of your orator's claim, with interest as aforesaid; and that your orator may have such further or other relief as his case may require.

May it please your honor to grant unto your orator the writ of *subpœna* against the said ———, of ——— County, commanding him to appear in this court at some certain day to be therein named, and to answer the premises, and abide by and perform such decree as may be passed therein. ——— ———,

*Solicitor for Complainant.*

And your orator admits that the interest, which accrued due prior to and on the ———, has been paid to him by the said ———; and he also admits the receipt of the further sum of ———, which was paid to him on the ——— for further interest, and in part of the principal debt secured by said mortgage. But he insists that the residue of said debt, with interest accrued thereon since the last-mentioned day, is still due and owing to him.

*Or as follows:—*

And your orator admits, that sundry payments have been made to him by the said ———, on account of said mortgage, as is more particularly admitted in the statement marked Exhibit B, and filed as part of this bill; but by said statement it appears, and so he insists, there is yet due to him on said mortgage a balance of ———, besides interest thereon from the ——— day of ———.

2. *Bill by mortgagee for foreclosure against surviving mortgagor, entitled as surviving devisee to the equity of redemption, as to one moiety for his own benefit, and as to the other in trust for himself and another individual (also a defendant) as devisees under another will.*

[*Title and address.*]

Humbly complaining, shows unto your honors, the plaintiff, very about the facts, special interrogatories are not usually inserted. Where, however, the case involves many circumstances which rest in the knowledge of a suspected defendant, or where, from any cause, a full and minute discovery is desired from him, the interrogatories should be drawn as particular and searching as possible.

A. H., of, etc., Esq., against S. M. C., of, etc., and G. R., of, etc., that J. S. C., now deceased, the said S. M. C., and the Reverend P. K., now deceased, being or alleging themselves to be seised of, and entitled to, the premises hereinafter particularly described, in trust for the benefit of the said J. S. C. and S. M. C., and having occasion to borrow the sum of five thousand five hundred dollars, applied to and requested the plaintiff to lend them the sum of three thousand dollars, part of such sum of five thousand five hundred dollars, on the security hereinafter mentioned, and that the plaintiff complied with such request, and did accordingly lend and advance the sum of three thousand dollars to the said J. S. C., S. M. C., and P. K. And that, thereupon, and in order to secure the repayment thereof with interest, the said J. S. C., S. M. C., and P. K. duly executed a certain indenture of mortgage bearing date, etc., and made, or expressed to be made, between the said J. S. C., S. M. C., and P. K., of the one part, and the plaintiff of the other part. And that thereby, after reciting as therein mentioned, it was witnessed that for and in consideration of the said sum of three thousand dollars to the said J. S. C., S. M. C., and P. K., paid by the plaintiff, the receipt whereof they did thereby acknowledge, they, the said J. S. C., S. M. C., and P. K., and each of them, did grant, bargain, sell, and convey unto the plaintiff, his heirs and assigns, all that capital messuage, etc., together with all and every the appurtenances, etc., to hold the said messuage, etc., unto the plaintiff, his heirs and assigns, in fee-simple forever, but subject to a proviso for redemption upon payment by the said J. S. C., S. M. C., and P. K., their heirs, executors, administrators, or assigns, unto the plaintiff, his executors, administrators, or assigns, of the said sum of three thousand dollars, with interest after the rate of five per cent per annum at or upon the ——— day of ——— then next ensuing; as in and by the said indenture, reference being thereto had, will more fully appear. And the plaintiff further shows unto your honors, that the said sum of three thousand dollars was not paid to the plaintiff at the time, for that purpose, limited by the said indenture, for the payment of the same, and that thereby the

estate of the plaintiff in the said mortgaged premises became absolute at law. And the plaintiff further sheweth unto your honors, that in or about the year ——— the said J. S. C. died, having first made his will bearing date ———, whereby he devised all real estate, including his interest in the said mortgaged premises, to the said S. M. C. and P. K., and to G. R., of ———, and their heirs. And the plaintiff further shows unto your honors that the said P. K. had no beneficial interest in the said mortgaged premises; and that he died sometime since, leaving the said S. M. C. him surviving; and that the said S. M. C. is alone now entitled to the equity of redemption of the mortgaged premises in trust, as to one moiety thereof, for his own use and benefit, and in trust, as to the other moiety, for the use and benefit of himself and the said G. R., as devisees of the said J. S. C. And the plaintiff further shows that the said sum of three thousand dollars, together with a considerable arrear of interest accrued due thereon, is now due to the plaintiff on the security of the said premises. And that the plaintiff has frequently, and in a friendly manner, applied to the said S. M. C., and requested him to pay the same and release his equity of redemption of and in the said mortgaged premises. And the plaintiff well hoped that such, his just and reasonable requests, would have been complied with, as in justice and equity they ought to have been. *But now so it is*, may it please your honors, that the said S. M. C., combining with the said G. R., and contriving how to injure the plaintiff in the premises, refuses so to do, although your orator charges that the plaintiff did, as aforesaid, well and truly advance and pay the said sum of three thousand dollars to the said J. S. C., S. M. C., and P. K., and that for securing the repayment thereof, with interest, the said J. S. C., S. M. C., and P. K., duly made and executed to the plaintiff such indenture as is hereinbefore mentioned; and that the whole of the said sum of three thousand dollars, together with a large arrear of interest accrued due thereon, is now justly due and owing to the plaintiff on the security aforesaid. And the plaintiff charges that the mortgaged premises are a very scant security for the repayment of what is due and owing to



the plaintiff on the security thereof. And the plaintiff charges that the said G. R. is, and claims to be interested in the said mortgaged premises, or some part thereof, and to be entitled to redeem the same; but he, and also the said S. M. C., refuses so to do. And the plaintiff charges that the said defendants ought either to pay what is due to plaintiff as aforesaid, or otherwise to release their equity of redemption in the said premises, but they refuse so to do. All which actings, etc. (*See form No. p. .*) And that the said defendants may answer the premises; and that an account may be taken by and under the direction and decree of this honorable court of what is due and owing to the plaintiff for principal money and interest on the security of the said mortgaged premises; and that the said defendants may be decreed to pay unto the plaintiff what shall appear to be justly due and owing to him on the taking of the aforesaid account, together with his costs of this suit, by a short day to be appointed by this court for that purpose, the plaintiff being ready and willing, and hereby offering, on being paid his principal money and interest and costs, at such appointed time, to reconvey the said mortgaged premises unto the said defendants, or unto either of them, as this honorable court shall direct. And in default of such payment, that the said defendants, and all persons claiming under them, may be absolutely barred and foreclosed of and from all right and equity of redemption in and to the said mortgaged premises, and every part thereof, forever. And may deliver up to the plaintiff all and every the deeds, writings, and documents in their or either of their possession, custody, or power, relating to the said mortgaged premises, and every part thereof. (*And for further relief, see form No. , p. .*) May it please your honors, etc. [*Pray subpoena against S. M. C. and G. R.*]

### 8. *Prayer in a bill for foreclosure and sale.*

That an account may be taken by or under the direction of this honorable court, of what is due for the principal and interest on the said mortgage, and that the said defendants, or some one of them, may pay unto the plaintiff the money which shall be found due to him by a short day, to be appointed for

that purpose by this honorable court; or, in default thereof, that all the said defendants, and their respective heirs, executors, and administrators, and all other persons claiming, or to claim by, from, or under them, or any of them, may be absolutely barred and foreclosed of and from all right and equity of redemption of, in, and to the said estates, and every part thereof; or, if on any account the plaintiff is not entitled to such foreclosure, then that the said estates may be sold, and all proper parties may join therein, and that the money so due to the plaintiff may be paid to him by and out of the money which shall be raised by such sale, etc., etc.

## XVI. BILLS OF INTERPLEADER.<sup>1</sup>

1. *Dil by a lessee against different persons, claiming the rents by different titles, to have them interplead.*

[*Title and address.*]

Humbly complaining, sheweth unto your lordship your orator A. B., of, etc., that the mayor, citizens, and commonalty of the city of C., being seised as of fee, of and in the perpetual curacy of D., by indenture, etc. (*State the demise from the corporation to the Reverend E. D., etc., clerk, a defendant hereinafter named, for life; and state the demise of the tithes from the said E. D. to the complainant; and also state a subsequent grant of an annuity out of the profits of the said perpetual curacy by the said E. D. to F. G., another defendant hereinafter*

<sup>1</sup> Where two or more persons whose titles are connected by reason of one being derived from the other, or of both being derived from a common source, claim the same thing, debt, or duty by different or separate interests from a third person, and he, not knowing to which one of the claimants he ought of right to render the debt or duty, or to deliver the thing, fears that he may be hurt by some of them, he may maintain a suit and obtain against them the remedy of interpleader. In his bill of complaint, he must state his own rights and their several claims, and pray that they may interplead, so that the court may adjudge to whom the debt, thing, or duty belongs, and he may be indemnified. If any suits at law have been brought against him he may pray that such proceedings be restrained until the right be determined. Mitford's Eq. Pl. pp. 58, 59. If the party has in any way made himself liable, even for the same demand, to two claimants, he cannot have a bill of interpleader; for it is absolutely necessary to enable him to file the bill that he should be liable to one of the two claimants. *Crawford v. Fisher*, 1 Hare, 436-441; *East & West India Dock Co. v. Littledale*, 7 Hare, 57-60; *Greene v. Mumford*, 4 R. L. 313; *Pfister v. Wade*, 56 Cal. 42.

*named.*) And your orator further sheweth unto your lordship, that the said E. D., at the time of making the said last-mentioned indenture or grant of annuity to the said F. G., and on or about the ——— day of ———, in the year ———, was actually a prisoner in his majesty's King's Bench prison for debt, at the suit of one L. M., and others his creditors; and that on the ——— day of ———, in the year ———, at a session then held at Horsemonger Lane, in the parish of St. Mary's, Newington, in and for the county of Surrey, the said E. D. applied to be discharged and exonerated under and by virtue of a certain act of Parliament made and passed in the fifty-first year of the reign of his late majesty, entitled "An act for the relief of certain insolvent 'debtors'"; and the justices of the peace present at such sessions adjudged the said E. D. to be set at liberty, and he was discharged accordingly; and by virtue of the said act of Parliament, all the real and personal estate of the said E. D. was immediately after such adjudication, thereby, and now is, vested in N. O., of, etc., Esq., the clerk of the peace of the said county of Surrey (another defendant hereinafter named), upon the trust, and for the purposes in the said act mentioned; but the said N. O. has not hitherto made any conveyance or assignment thereof. And your orator further sheweth unto your lordship, that your orator, in pursuance of the said indenture of demise so made by the said E. D. as aforesaid, duly paid the said rent of £——, thereby reserved for the said tithes, up to the ——— day of ——— last; and your orator has always been ready and desirous to pay the rent for the said tithes, which has become due since that period, to the person or persons duly entitled to receive the same; and your orator hoped he should have been able so to have paid the said rent, and that no dispute could have arisen concerning the same, or at least that no suit would have been commenced against your orator in respect to the said rent; and that the said E. D., F. G., and N. O. would have settled between themselves their differences respecting the right to receive the said rent. But now so it is, may it please your lordship, the said E. D., F. G., and N. O. respectively claim to be entitled to the said rent; and the said E. D. has lately commenced an action in his majesty's court of

common pleas at Westminster, for the recovery of the sum of £——, on account of the said rent, due from your orator since —— aforesaid. And the said E. D. pretends that he is discharged from the said annuity so granted by him as aforesaid, in consequence of his having taken the benefit of the said insolvent act, and that the interest of him, the said E. D., does not vest in the said N. O. as such clerk of the peace as aforesaid, by the operation of that act; and the said F. G. insists that he ought to be paid his said annuity out of the said rent now due from your orator, and that the said E. D. is not discharged from such annuity, under or by virtue of such insolvent act, but that the said annual rent, payable by your orator, still remains liable to the payment of such annuity, and he threatens and intends to proceed at law against your orator, unless the said annuity be paid by him out of such rent. And the said N. O. pretends and insists that all the said estate, right, and interest in the said tithes vested in him, the said N. O., as such clerk of the peace as aforesaid, by the operation of the said insolvent act, and that he is therefore entitled to receive the said rent of £——, payable by your orator, which he insists is no longer liable to the payment of the said annuity. And your orator, under the circumstances aforesaid, is in danger of being greatly harrassed on account of the said rent, and cannot safely pay the same without the aid of this honorable court. And that the said E. D. and F. G. and N. O. respectively, may set forth to whom the said rent is due and payable, and may be decreed to interplead, and adjust the said several claims and demands between themselves, your orator hereby offering to account for, and pay the arrears of the said rent now due from him to such of them, the said E. D., F. G., and N. O., as the same shall appear of right to belong and be payable, on being indemnified by this honorable court in so doing, or to pay the same into the hands of the accountant-general of this honorable court, to be disposed of as this honorable court shall direct. And that the said E. D. may be restrained by the order and injunction of this honorable court from further prosecution of the said action so commenced by him against your orator as aforesaid, and that he, and the said F. G. and N. O. respectively,

may in like manner be restrained from all other proceedings at law whatsoever, touching the matters in question in this suit, or any of them. [*And for general relief.*] May it please, etc. [*End with praying an injunction in the terms of the prayer, and also a subpoena against the said E. D., F. G., and N. O.*]

## 2. *Prayer of a bill of interpleader.*

And that the said several defendants may be decreed to interplead touching their said several claims, and that *plaintiff* may be at liberty to pay the several sums now justly and fairly due from him for the rent of the said messuage or tenement and premises into the bank, in the name and with the privity of the accountant-general of this honorable court, in trust for the benefit of the persons or person entitled thereto, subject to the further order of this court, after deducting thereout in the first place the aforesaid sum of £36, to be allowed unto *plaintiff* for repairs pursuant to the said agreement, together with all sums of money expended and advanced by *plaintiff* for land tax and other necessary outgoings in respect of the said premises. And that *plaintiff* may be at liberty to quit the possession of the said premises, and that possession thereof may be delivered up to such person or persons as this honorable court shall direct or appoint. And that *plaintiff* may have a satisfaction or allowance made unto him out of the rent of the said premises for the several articles hereinbefore and in the said first agreement particularly mentioned, which have been provided by *plaintiff* at his own expense for the said premises. And that in the mean time the said defendants, S. O. and T. C., may be restrained by the order or injunction of this honorable court from all further proceedings in the aforesaid action of ejectment brought against *plaintiff*, and that they and all the said other defendants may be in like manner restrained from making any distresses or distress upon the said messuage or tenement and premises, and from commencing or prosecuting any action or actions at law against *plaintiff* to recover the rent of the said premises, or to turn *plaintiff* out of possession thereof, or otherwise from proceeding at law against *plaintiff* touching

any one of the matters aforesaid. And that all proper and necessary directions may be given for the purposes aforesaid. [*And for further relief.*]

**3. *Form of affidavit to be annexed to a bill of interpleader.***

The said J. C. maketh oath and saith, that he has exhibited his bill of interpleader against the defendants in this cause without any fraud or collusion between him and the said defendants, or any or either of them; and that he, the said J. C. hath not exhibited his said bill at the request of the said defendants, or of any or of either of them, and that he is not indemnified by the said defendants, or by any or either of them, and saith that he has exhibited his said bill with no other intent but to avoid being sued or molested by the said defendants, who are proceeding or threaten to proceed at law against him for the recovery of the rent of the said tithes in the said bill mentioned.

Sworn, etc.,

J. C.

**4. *Another form of affidavit.***

A. B., the above-named plaintiff, maketh oath and saith, that he doth not in any respect collude with either of the above-named defendants touching the matters in question in this cause, nor is he in any manner indemnified by the said defendants, or either of them, nor hath he exhibited his said bill of interpleader at the request of them, or either of them, but merely of his own free will, and to avoid being sued or molested touching the matters contained in his said bill.

Sworn, etc.,

A. B.

**5. *Still another form.***

I, A. B., the above-named plaintiff, make oath and say, that the bill in this suit [*or, the bill hereunto annexed*] is not filed by me in collusion with *any* or either of the defendants in the said bill named, but such bill is filed by me of my own accord for relief in this honorable court.

Sworn, etc.,

A. B.

XVII. BILLS FOR THE PAYMENT OF LEGACIES.<sup>1</sup>1. *Bill by husband of legatee against executor.*

[Title and address.]

Humbly complaining, sheweth unto your honors your orator A. B., of, etc. That W. S., late of, etc., duly made and published his last will and testament in writing, bearing date on or about ———, and thereby amongst other bequests gave to his nephews and nieces, the children of his late sister M. A., the sum of \$——— each, to be paid to them as they should respectively attain the age of twenty-one years, and appointed E. T. F., of, etc., the defendant hereinafter named, the sole executor of his said will, as in and by the said will, or the probate thereof when produced will appear. And your orator further sheweth unto your honors that the said E. T. F., soon after the death of the said testator, duly proved the said will in the proper court, and hath since possessed himself of the personal estate and effects of the said testator to an amount much more than sufficient for the payment of his just debts, funeral, and testamentary expenses and legacies. And your orator further sheweth that after the death of the said testator your orator intermarried with A. A., who was the niece of the said testator, and one of the children of the said M. A., in the said will named, and by virtue of such intermarriage your orator in right of his said wife became entitled to demand and receive the aforesaid bequest of \$———. And your orator further sheweth that your orator's said wife lived to attain her age of twenty-one years, and that she hath lately departed this life,

<sup>1</sup> To recover a legacy at common law the assent of the executor was necessary; and the jurisdiction of equity over legacies as well as over administrations is based upon the trust relation existing between an executor or administrator and the creditors, legatees, and distributees; upon the necessity of a discovery, an accounting or a distributing of assets in order to determine the rights of all interested parties; and the fact that the remedies given by all other courts are inadequate, incomplete, and uncertain. Pom. Eq. Jur. § 1127. In this country, Probate Courts have generally the power to decree the payment of legacies at the suit of the individual legatees, during the pendency of an administration; and in such proceedings they follow the settled doctrines of equity. Pom. Eq. Jur. § 1129. For an extensive collation of the cases illustrating the jurisdiction of Probate Courts and courts of equity in the several States over the administration of estates, including suits for the payments of legacies, see Pom. Eq. Jur. § 1154, note 2.

and that neither your orator nor his said wife received any part of the said legacy. And your orator further sheweth that having obtained letters of administration upon the estate of his said wife, he hath repeatedly applied to the said E. T. F. for payment of the said legacy, and interest thereon from the time of his said late wife attaining her age of twenty-one years, and your orator hoped that such his reasonable requests would have been complied with, as in justice and equity they ought to have been. But now so it is, may it please your honors, that the said E. T. F., combining, etc. To the end, therefore, that, etc.

And that an account may be taken of what is due and owing to your orator for the principal and interest of the said legacy, and that the said defendant may be decreed to pay the same to your orator. And if the said defendant shall not admit assets of the said testator sufficient to answer the same, then that an account may be taken of the estate and effects of the said testator which have been possessed or received by the said defendant, or by any other person by his order or to his use, and that the same may be applied in a due course of administration. [And for further relief.] May it please your honors, etc.

J. L.

2. *Bill on behalf of infant legatees entitled to a sum of stock standing in the names of the executors, praying to have a guardian appointed, maintenance allowed for the time past and to come, an account taken of the dividends retained by the executors, and to have the stock transferred into the accountant-general's name.*<sup>1</sup>

[Title and address.]

Humbly complaining, show unto your honors the plaintiffs, E. H., J. H., T. H., and M. A. H., infants under the age of twenty-one years, by J. E., of, etc., their next friend, that E. H., the elder, late of, etc., but now deceased, duly made and published his last will and testament in writing, bearing date, etc., whereby he directed that W. T., of, etc., and E. B., of, etc., the

<sup>1</sup> A specific legatee, filing a bill for a general account of the administration, is not confined to the particular errors alleged in the bill, as he might be if he were surcharging and falsifying a stated account. *Pulliam v. Pulliam*, 10 Fed. Rep. 53.



defendants hereinafter named, and C. G., of etc., who were the trustees and executors in his said will named, should, out of the moneys which should come to their hands in manner therein mentioned, lay out and invest in or upon government or real securities at interest the sum of \$—— upon trust, etc. [*The trustees were to pay the dividends to E. H., the testator's wife, during her life or until her second marriage, and after her decease or second marriage, the whole of the dividends to be applied by the trustees for the maintenance and education of testator's grandchildren, the plaintiffs, to whom the principal was to be transferred, to the grandsons at twenty-one, and to the granddaughters at twenty-one or marriage*], as in and by, etc. And the plaintiffs further show that the said testator departed this life in or about the month of ——, without having in any manner revoked or altered the said will, except by a codicil bearing date, etc., which did not relate to or affect the said trusts of the said sum of \$——. And the plaintiffs further show unto your honors that W. T. and E. B., and the said C. G., duly proved the said testator's will, and acted in the trusts thereof, and out of the moneys which came to their hands from the estate and effects of the said testator, in or about, etc., appropriated the sum of £——, in satisfaction of the aforesaid legacy in the purchase of the sum of £—— three per cent consolidated bank annuities, and the said sum of stock is now standing in their names in the books of the governor and company of the Bank of England. And the plaintiffs further show that the said C. G. has departed this life, and that the said E. H., on or about, etc., intermarried with and is now the wife of the said J. E., whereupon the interest of the said E. H. in the said sum of £—— three per cent consolidated bank annuities wholly ceased. And the plaintiffs further show that the said defendants paid to the said J. E. and E., his wife, the year's dividends which became due on the said sum of stock on the —— day of ——, as well for the interest of the said E. E. in the said stock as for the maintenance and education of the plaintiffs up to that time; but the said defendants have retained in their hands the subsequent dividends which accrued due on the said stock, and have made no payments or allowances there-

out for the maintenance or education of the plaintiffs. And the plaintiffs further show that some proper person or persons ought to be appointed as the guardian or guardians of the plaintiffs, with suitable allowances for their maintenance and education for the time past since the said — day of —, and for the time to come, and that the said sum of stock ought to be secured in this honorable court. *To the end, therefore, etc.*

And that the said defendants may answer the premises, and that some proper person or persons may be appointed the guardian or guardians of the plaintiffs, with suitable allowances for their maintenance and education for the time past since the said — day of —, and for the time to come, and that the said defendants may account for the dividends of the said trust stock which have accrued due since the said — day of —, and may thereout pay the allowances which shall be made for the maintenance and education of the plaintiffs since the said — day of —, and may pay the residue thereof into this honorable court for the benefit of the plaintiffs; and may also transfer the said sum of £—— three per cent consolidated bank annuities into the name of the accountant-general of this honorable court, to be there secured for the benefit of the plaintiffs, and such other persons as may eventually be interested therein. [*And for further relief.*] May it please, etc.

**8. *Bill against an executor by legatees and the administrator of a deceased legatee, for payment of their legacies and shares of the residuary personal estate.***

[*Title and address.*]

Humbly complaining, show unto your honors your orators and oratrix, H. K., the elder of, etc., administrator of the goods and chattels, rights and credits of F. K., late of, etc., deceased, H. K., the younger of, etc., and S. K., an infant under the age of twenty-one years, to wit, about the age of twenty years, by the said H. K., the elder, her father and next friend, that J. R., late of, etc., being possessed of, or well entitled unto a considerable personal estate, duly made and

published his last will and testament in writing, and a codicil thereunto annexed, the said will bearing date on or about the ——— day of ———, and by his said will amongst other things gave and bequeathed unto your oratrix, S. K., the sum of \$——, to be paid to her at the age of twenty-one years or day of marriage, which should first happen. And the said testator also gave and bequeathed unto your orator H. K., the younger, the sum of \$——, to be paid to him on his attaining his age of twenty-one years. And the said testator, after giving divers other legacies, gave and bequeathed unto R. B. (the defendant hereinafter named), and W. R. H., of, etc., and who departed this life in the lifetime of the said testator, the rest and residue of his estate and effects in trust, to be equally divided between such children of his, the said testator's niece M. K., as should be living at the time of his decease, and thereby appointed the said R. B. executor thereof. As in and by the said will, or the probate thereof, when produced to this honorable court will appear. And your orators and oratrix further show unto your honors, that the said J. R. departed this life on or about ——— without revoking or altering his said will, save by the said codicil, and without revoking or altering the said codicil, or any part thereof; whereupon the said R. B., the executor in the said will named, duly proved the same in the proper court, and undertook the executorship thereof, and possessed himself of the personal estate and effects of the said testator to a very considerable amount, and more than sufficient to discharge his just debts, funeral expenses, and legacies. And your orators and oratrix further show unto your honors that the said F. K., in the said testator's will named, and your orator and oratrix H. K., the younger, and S. K. were the only children of the said M. K. in the said will named who were living at the time of the death of the said testator, and your orator H. K., the younger, became entitled to have and receive his said legacy of \$—— so bequeathed to him as aforesaid, and also his third part or share of the residue of the personal estate and effects of the said testator after payment of all his just debts, legacies, and funeral expenses; and your oratrix S. K. is entitled to have her said legacy of \$——, and also her third

part or share of the said residue secured for her benefit until she shall attain her age of twenty-one years or day of marriage; and your orator H. K., the elder, is entitled as such administrator of the said F. K., as aforesaid, to have and receive the remaining third part or share of the said residue. And your orators and oratrix further show unto your honors that the said F. K. departed this life on or about ———, intestat, and that since his death your orator, the said H. K., the elder, has obtained letters of administration of the personal estate and effects of the said F. K., to be granted to him by the proper court. And your orators and oratrix further show unto your honors that your orator H. K., the younger, attained the age of twenty-one years on or about ———, and your orators and oratrix being so entitled as aforesaid, your orators have made frequent applications to the said R. B., to pay the said legacy of \$———, and the said two-third shares of the said residue; and your oratrix hath also applied to him, the said R. B., to lay out and invest hersaid legacy of \$———, and her third share of the said residue, upon some proper security, for her benefit, until she shall attain her age of twenty-one years or day of marriage, with which just and reasonable requests your orators and oratrix well hoped that the said defendant would have complied, as in justice and equity he ought to have done. But now so it is, etc., he absolutely refuses so to do, sometimes pretending that the said testator never made any such will as is hereinbefore stated. Whereas your orators and oratrix charge the contrary thereof to be true, and so the said defendant will at other times admit. But then again he pretends that the said testator's personal estate was very small and inconsiderable, and not nearly sufficient to pay and satisfy his just debts and funeral expenses. Whereas your orators and oratrix expressly charge that the said personal estate and effects of the said testator were much more than sufficient to discharge the said testator's just debts, and funeral expenses, and legacies; and so it would appear if the said defendant would set forth a full, true, and particular account of all and every the personal estate and effects of the said testator come to his hands or use, and also a full, true, and particular account of the manner in

which he hath disposed of or applied the same, but which the said defendant refuses to do. All which actings, etc.

And that the said defendant may answer the premises; and that an account may be taken of the personal estate and effects of the said testator come to the hands of the said defendant, or of any person or persons by his order or for his use, and also of the said testator's funeral expenses, debts, and legacies; and that the same may be applied in a due course of administration; and that the said defendant may be decreed to pay to your said orator H. K., the younger, his said legacy of \$——; and that the clear residue of the said testator's personal estate and effects may be ascertained, and that such share thereof as shall appear to belong and be due to your orators respectively may be paid to them respectively, and that your oratrix's said legacy of \$——, and also such share of the said residue as she shall appear to be entitled to, may be secured for her benefit; and that for those purposes all proper directions may be given. [*And for further relief.*] May it please, etc.

## XVIII. BILLS FOR PARTITION.<sup>1</sup>

### 1. *By one tenant in common against another.*

[*Title and address.*]

Humbly complaining, sheweth unto your honors your orator C. A., of, etc. That your orator is seised to him and his heirs of a capital messuage or mansion-house, called S., and of several stables, out-buildings, gardens, and closes of land, in the county of B., all which premises are now in the occupation of your orator; and your orator is also seised of two equal undivided third parts of and in an estate called S., consisting of a farm-house, stable, and out-houses, and about —— acres of

<sup>1</sup> Partition became a matter of equitable cognizance during the reign of Elizabeth, and it is not confined to tenants in possession, but extends to all persons interested, whether presently or in expectancy; and remaindermen, reversioners, infants, and persons not in being may be bound by the decree. Plaintiff's title may be proved by means of a discovery, and if need be, by a reference to the master. When plaintiff's title is disputed, equity will decline jurisdiction to try the question, but will retain the bill until the issue of titles has been determined at law. But if the disputed titles are equitable, equity will settle them, and then grant final relief by way of partition under the same bill. Pom. Eq. Jur. §§1387, 1388.

land, which said farm is let to H. N., at the yearly rent of \$——. And your orator further showeth unto your honors, that E. B., of, etc. (the defendant hereinafter named), is seised of or entitled to the other undivided third part of the said farm, by virtue of, and under some conveyance made to him by E., his wife (late E. A., your orator's sister), before her intermarriage with the said E. B. And your orator further showeth unto your honors that all the said premises were formerly the estate of H. A., your orator's late father, deceased, who built the said capital messuage or dwelling-house, and set apart, and converted part thereof into a farm-house. And your orator further showeth unto your honors that your orator has no separate yard, but makes use of the yard belonging to the said farm-house, in common with the tenant; and that your orator's stable and several of his out-houses are intermixed in the same yard with those of the said tenant. And your orator further showeth unto your honors that the enjoyment of the said farm and premises in common is liable to difficulties and controversies, and is attended with great inconvenience, especially to your orator, whose separate property adjoins thereto, and is intermixed therewith. And your orator has therefore applied to the said E. B. to consent to a partition of the said farm and premises, and hoped he would have complied with such request. But now so it is, the said E. B. refuses to consent thereto, unless compelled by a judgment at common law, or by the decree of this honorable court. To the end, therefore, etc. [*Interrogate to the material parts of the statement.*] And that a commission may issue out of this honorable court, to divide, separate, and allot one-third part of the said farm and premises from the other parts thereof, to be held and enjoyed by the said E. B. and his heirs in severalty; and that your orator, his heirs and assigns, may be decreed to enjoy the other two-third parts in severalty from the said E. B.; and that proper conveyances may be executed accordingly, or that your honors will make such other order and decree in the matters aforesaid, as to your honors may seem meet, and the circumstances of this case require. May it please, etc. [*End by praying process of subpoena against the said E. B.*]

2. *Bill by co-heiresses and their husbands for a partition of freehold estates.*<sup>1</sup>

[*Title and address.*]

Humbly complaining, show unto your honors the plaintiffs, T. K., of, etc., and C., his wife, L. G., of ———, and M., his wife, and J. V., of, etc., widow, that W. S., of, etc., deceased, the late father of the plaintiffs, C. K., M. G., and J. V., and also E. F., wife of R. F., of, etc., the defendants hereinafter named, was in his lifetime, and at the time of his death, seised in fee-simple or of some other good estate of inheritance to him and his heirs, of and in all that messuage or dwelling-house, etc., and also of and in all that other messuage, etc.; all which said messuages, land, and premises are situate, lying, and being in, etc., and being so seised, he, the said W. S., did many years since depart this life, intestate, leaving M. S., his wife, and the said C. K., M. G., and J. V., and their sister E. F., his four daughters and only children, and co-heiresses, him surviving; and upon his death the said messuages, etc., and premises descended upon and came to the said C. K., M. G., and J. V., and the said E. F., as such co-heiresses, subject only to the dower of their said mother, M. S. And the plaintiffs further show unto your honors, that the said M. S., the widow and relict of the said W. S., departed this life sometime in or about the month of ———, whereupon the plaintiffs, T. K. and C., his wife, and L. G. and M., his wife, in right of the said C. and M., and also said J. V., and the said R. F. and E., his wife, in right of the said E., have ever since been, and now are, severally seised in fee of and in the said messuages, etc., and premises in four equal undivided parts or shares as tenants in coparcenary. And the plaintiffs further show, that they have frequently applied unto and requested the said R. F. and E., his wife, to join and concur with the plaintiffs in making a fair, just, and equal partition of the said premises between them, in order that their respective shares and proportions thereof may be allotted, held, and enjoyed in severalty. And the

<sup>1</sup> A bill in equity to determine and settle a disputed legal title, and for a partition of the land, is multifarious. *Chapin v. Lears*, 18 Fed. Rep. 814.

plaintiffs well hoped that the said R. F. and E., his wife, would have complied with such their reasonable requests, as in justice and equity they ought to have done. But now so it is, etc., etc., they, the said defendants, absolutely refuse to comply with such the plaintiffs' reasonable requests as aforesaid, pretending that the plaintiffs and the said defendants have ever since the death of the said W. S. and M. S. respectively, their said father and mother, deceased, constantly and regularly divided the yearly rents and profits of all the said messuages, etc., and premises equally between them, and that it will not be to the benefit or advantage of either of them to make an actual partition thereof. Whereas the plaintiffs charge, and so the truth is, that a fair, just, and equal partition of the said premises will tend greatly to the benefit and advantage of the plaintiffs and the said defendants; but they, the said defendants, under divers frivolous pretenses, absolutely refuse to join or concur with the plaintiffs therein. All which actings, etc.

And that a commission of partition may be issued out of and under the seal of this honorable court, and directed to certain commissioners therein named, to divide and allot the said messuages, etc., and premises in equal fourth parts or shares; and that one full and equal fourth part or share may be allotted and conveyed unto the plaintiffs T. K. and C., his wife, and the heirs and assigns of the plaintiff C. K.; that one other full and equal fourth part or share may be allotted and conveyed unto the plaintiff L. G. and M., his wife, and the heirs and assigns of the plaintiff M. G.; and that one other full and equal fourth part or share may be allotted and conveyed unto the plaintiff J. V., her heirs and assigns; and that the plaintiffs, T. K. and C., his wife, L. G. and M., his wife, and J. V., may severally hold and enjoy their respective allotments of the said premises according to the natures thereof in severalty; and that all proper and necessary conveyances and assurances may be executed for carrying such partition into effect, etc. May it please, etc.



## XIX. BILLS RELATING TO PARTNERSHIPS.

1. *Bill for a dissolution of a partnership, and for an injunction to restrain one of the defendants from collecting debts.*

[*Title and address.*]

Humbly complaining, sheweth unto your honors your orator P. C., of, etc. That in or about the month of ———, your orator entered into an agreement with C. B., of, etc., and C. F., of, etc., the defendants hereinafter named, to form a partnership with them, in the business of auctioneers, which agreement was reduced into writing, and signed by your orator and the said defendants, and was in the words and figures, or to the purport and effect following, that is to say: [*Stating the same.*] As in and by the said agreement, reference being thereunto had, will appear. And your orator further sheweth that the said copartnership business was entered upon and hath ever since continued to be carried on by your orator and the said defendants, in pursuance of and under the aforesaid agreement, no articles or other instrument having ever been prepared and executed between them. And your orator further sheweth unto your honors, that having much reason to be dissatisfied with the conduct of the said C. B., and being desirous therefore to dissolve the said partnership, your orator, on or about ———, caused a notice in writing, signed by your orator, to be delivered to the said C. B. and C. F., in the words and figures of the purport and effect following, that is to say: "In conformity," etc., etc. As in and by such written notice now in the custody or power of the said defendants, or one of them, when produced, will appear. And your orator further sheweth that the said C. B. hath from time to time since the commencement of the said partnership, applied to his own use, from the receipts and profits of the said business, very large sums of money, greatly exceeding the proportion thereof to which he was entitled, and in order to conceal the same, the said C. B., who has always had the management of the said copartnership books, hath never once balanced the said books. And your orator further sheweth that having, in the beginning of the year ———, discovered that the said C. B. was greatly in-

debted to the said copartnership, by reason of his application of the partnership moneys to his own use, your orator, in order to form some check upon the conduct of the said C. B., requested that he would pay all copartnership moneys which he received into their bankers, and would draw for such sums as he had occasion for; but the said C. B. hath wholly disregarded such request, and hath continued to apply the partnership moneys received by him to his own use, without paying the same into the bankers, and hath also taken to his own use, moneys received by the clerks, and hath by such means greatly increased his debt to the partnership, without affording to your orator and the said C. F. any adequate means of ascertaining the true state of his accounts. And your orator further sheweth, that he hath, by himself and his agents, from time to time applied to the said C. B., and hath requested him to come to a full and fair account in respect of the said copartnership transactions, with which just and reasonable requests your orator well hoped that the said defendant would have complied, as in justice and equity he ought to have done. But now so it is, etc. (*see form No. p.* ), the said defendant C. B. absolutely refuses so to do, and he at times pretends that he hath not received and applied to his own use more than his due proportion of the partnership profits. Whereas your orator charges the contrary thereof to be the truth, and so it would appear if the said defendant would set forth a full and true account of all and every his receipts and payments, in respect of the said partnership transactions, and of the gains and profits which have been made in each year since the commencement of the said partnership. And your orator charges that the said C. B. hath in fact received the sum of \$——, and upwards, beyond his due proportion of the partnership profits, and that he is nevertheless proceeding to collect in the partnership debts and moneys, whereby the balance due from him will be increased, to the great loss and injury of your orator and the said C. F. And your orator charges that the said C. B. ought therefore to be restrained by the order and injunction of this honorable court from collecting and receiving any of the said partnership debts and moneys. And your orator charges

that the said C. F. refuses to join your orator in this suit. All which actings, etc.

And that the said defendants may answer the premises; and that the said copartnership may be declared void, and that an account may be taken of all and every the said copartnership dealings and transactions from the time of the commencement thereof; and also an account of the moneys received and paid by your orator and the said defendants respectively in regard thereto. And that the said defendants may be decreed to pay to your orator what, if anything, shall, upon the taking of the said accounts, appear to be due to him, your orator being ready and willing, and hereby offering to pay to the said defendants, or either of them, what, if anything, shall upon the taking of the said accounts appear to be due to them, or either of them, from your orator. And that in the mean time, the said defendant C. B. may be restrained by the order and injunction of this honorable court from collecting or receiving the partnership debts or other moneys. [*And for further relief.*] May it please, etc.

J. L.

*Pray subpoena against U. F., and subpoena and injunction against C. B.*

**2. Bill for an account of partnership dealings after a dissolution, and for a receiver, and also for an injunction to restrain the defendant from receiving any of the partnership debts.<sup>1</sup>**

Humbly complaining, sheweth unto your honors your orator A. B., of ———, that on or about ———, your orator and P. H.

<sup>1</sup> Equity has practically exclusive jurisdiction in proceedings for an account and settlement of partnership affairs, including suits for an account and settlement between the partners themselves, suits for a settlement of firm affairs between the survivors and the personal representatives of a deceased partner, and suits to settle the affairs of an insolvent firm, and to adjust the demands of a firm's creditors, and the creditors of the individual partner. The equitable jurisdiction over partnerships is a necessary outgrowth of the jurisdiction over accounting, and the remedies of dissolution, injunction, and receivership are incidents necessary to a final and complete relief. Pom. Eq. Jur. § 1421. Equity has jurisdiction of matters of account where the parties stand in a fiduciary relation to each other, and the account is so complicated that it cannot be conveniently taken in a court of law. *Pacific R. R. of Mo. v. Atlantic & Pacific R. R. Co.* 20 Fed. Rep. 277. Thus complicated accounts preliminary to a distribution of assets or division of profits are of equity cognizance. *John Crossley Sons v. New Orleans*, 20 Fed. Rep. 352.

W. of, etc., the defendant hereinafter named, entered into copartnership together as attorneys and solicitors, your orator engaging to bring into the business the sum of \$——, and being to receive one-third part or share of the profits; and the said P. H. W., engaging to bring into the business the sum of \$——, and being to receive two-third parts or shares of the said profits. And your orator further sheweth unto your honors that your orator accordingly brought into the business the said sum of \$——, and that the said copartnership was carried on and continued until the —— day of ——, when the same was dissolved by mutual consent, and the usual advertisement of such dissolution was inserted in the —— Gazette. And your orator further sheweth that the said copartnership business was carried on in a house in ——, which at the time of the dissolution of the said copartnership was held by the said defendant and your orator under an agreement for a lease for —— years from ——, and it was verbally agreed between the said defendant and your orator that the said defendant should take to himself the benefit of the said agreement, accounting to your orator for his proportion of the value thereof, and in pursuance of such agreement the said defendant hath ever since continued, and now is in possession of the said house. And your orator further sheweth unto your honors, that no settlement of the said copartnership accounts hath ever been made between your orator and the said defendant, and that since the said dissolution your orator hath repeatedly applied to the said defendant to come to a final settlement with respect thereto. And your orator well hoped that the said defendant would have complied with such your orator's reasonable requests, as in justice and equity he ought to have done. But now so it is, etc., the said defendant absolutely refuses so to do. And your orator charges that the said defendant hath possessed himself of the said copartnership books, and hath refused to permit your orator to inspect the same, and hath also refused to render to your orator any account of the copartnership moneys received by him. And your orator charges that he has since the said dissolution paid the sum of \$—— in respect of the copartnership debts. And your ora-

tor further charges that upon a true and just settlement of said accounts it would appear that a considerable balance is due from the said defendant to your orator in respect of their said copartnership dealings; but nevertheless the said defendant is proceeding to collect in the said copartnership debts and to apply the same to his own use, which the said defendant is enabled to do by means of his possession of the books of account as aforesaid. And your orator charges that the said defendant ought to be restrained by the injunction of this honorable court from collecting in the said debts, and that some proper person ought to be appointed by this honorable court for that purpose. All which actings, etc.

And that an account may be taken of all and every the said late copartnership dealings and transactions until the time of the expiration thereof, and that the said P. H. W. may be directed to pay to your orator what, if anything, shall upon such account appear to be due from him, your orator being ready and willing, and hereby offering to pay to the said P. H. W. what, if anything, shall appear to be due to him from the said joint concern. And that some proper person may be appointed to receive and collect all moneys which may be coming to the credit of the said late copartnership. And that the said P. H. W. may in the mean time be restrained by the order and injunction of this honorable court from collecting or receiving any of the debts due and owing thereto. [*And for further relief.*] May it please, etc.

## XX. BILLS FOR REDEMPTION.

1. *Bill to have goods redelivered which have been deposited as a security for money lent.*

*Title and address.]*

Humbly complaining, sheweth unto your honors your orator A. S., of, etc., that your orator having occasion for a sum of money for the purposes of his business, made application to P. S., of, etc., the defendant hereinafter named, to lend him the same, and thereupon the said P. S., on or about ———, advanced and lent to your orator the sum of \$———, and in

order to secure the repayment thereof with interest, your orator deposited with the said defendant [*here insert a description of the goods*], which were of the value of \$——— and upwards, and at the same time executed and delivered to the said defendant a bill of sale of the said goods so deposited with him; but it was not meant and intended thereby, either by your orator or the said defendant, that the said transaction should amount to an absolute sale of the said goods to the said defendant, but it was expressly agreed between your orator and the said defendant that your orator should nevertheless be at liberty to redeem the same. And your orator further sheweth that being desirous to redeem the said goods, he hath repeatedly applied to the said P. S., and hath offered to repay him the said sum of \$———, with lawful interest thereon, on having the said goods redelivered to him, with which just and reasonable requests your orator well hoped that the said P. S. would have complied, as in justice and equity he ought to have done. But now so it is, etc. To the end, etc.

And that the defendant may answer the premises; and that an account may be taken of what is due to the said defendant for principal and interest in respect of the said loan of \$———, and that upon payment thereof by your orator the said defendant may be decreed to deliver over to your orator the said goods so deposited with him as aforesaid. [*And for further relief.*] May it please, etc.

J. L.

## 2. *Bill by the heir at law of the mortgagors for the redemption of freehold lands.*<sup>1</sup>

[*Title and address.*]

Humbly complaining, sheweth unto your honors the plaintiff J. G., of, etc., that J. G., the elder, late of, etc., but now deceased, and E., his wife, now also deceased, the late father and mother of the plaintiff, were in the right of the said

<sup>1</sup> A mortgagor in possession may maintain a bill for redemption whenever, from a dispute as to the amount due or any other cause, the mortgagee refuses to accept payment and to discharge the mortgage. The essential requisites to maintaining the suit are, that the mortgage debt should be due and payable, that the mortgagor should offer to pay whatever amount is due and should pay the same when ascertained and fixed by the decree. Pom. Eq. Jur. § 1219.

E. seised in fee-simple of, or otherwise well entitled to, two parcels of real estate, bounded and described as follows: [*Here insert boundaries, etc.*] And the plaintiff further sheweth that the said J. G., the elder, and E., his wife, in or about the year ———, made some conveyance and assignment of the said premises unto W. B., of, etc., the defendant hereinafter named, by way of mortgage, for securing the repayment of a certain sum of money, with interest, then advanced to the said J. G. by W. B., or by J. B., then of, etc., on the part of, and as the agent of, the said W. B.

And the plaintiff further sheweth unto your honors, that the said W. B., upon or soon after the making of the said security, entered into the possession of the said mortgaged premises, or into the receipts of the rents and profits thereof, and hath ever since continued in such possession and receipt, and the said W. B., or the said J. B., on his behalf, also possessed himself of all the title deeds relating to the said premises. And the plaintiff further sheweth that the said J. G., the elder, departed this life in or about the year ———, and that the said E., having survived her husband, departed this life on or about, etc., intestate, and without having made, after the death of her said husband, any conveyance or disposition of such right and interest as she retained at his death in the premises, leaving the plaintiff her eldest son and heir at law, who thereupon became entitled to the equity of redemption of the said mortgaged premises.

And the plaintiff further sheweth unto your honors, that the said W. B. from time to time made some small payments to the said J. G., the elder, in his lifetime, and after his death to the said E., out of the rents and profits of the said premises. And the said W. B. applied the greater part of such rents and profits to his own use, and by means thereof the said W. B. hath been more than repaid the principal and interest due to him on the security of the said premises. And the plaintiff hath frequently applied to the said W. B., and requested him to come to an account for the rents and profits of the said premises so received by him, and to pay over to the plaintiff what he should appear to have received beyond the amount of

the principal and interest due to him, and to deliver up the possession of the said mortgaged premises; and the plaintiff well hoped that the said defendant would have complied with such requests as in justice and equity he ought to have done, but that the said W. B., acting in concert with divers persons unknown to the plaintiff, refuses to comply therewith. *To the end, therefore, that, etc.*

And that the said defendant may answer the premises, and that an account may be taken of what, if anything, is due to the said defendant for principal and interest on the said mortgage, and that an account may also be taken of the rents and profits of the said mortgaged premises, which have been possessed or received by the said defendant, or by any other person or persons by his order or for his use, or which without his wilful default or neglect might have been received, and if it shall appear that the said rents and profits have been more than sufficient to satisfy the principal and interest of the said mortgage, then that the residue thereof may be paid over to the plaintiff; and that the plaintiff may be permitted to redeem the said premises, the plaintiff being ready and willing, and hereby offering to pay what, if anything, shall appear to remain due in respect to the principal and interest on the said mortgage; and that the said defendant may be decreed to assign and to deliver up possession of the said mortgaged premises to the plaintiff, or to such person as he shall direct, free from all encumbrances made by him, or any person claiming under him, and may deliver over to the plaintiff all deeds and writings in his custody or power relating to the said mortgaged premises. [*And for further relief.*] May it please, etc.

8. *Bill to redeem by purchaser of an equity of redemption from the assignee in insolvency of the mortgagor.*

[*Title and address.*]

W. H., of S., in the county of P., in the Rhode Island district, a citizen of the State of Rhode Island, brings this, his bill of complaint, against the president, directors, and company of the W. Bank, a corporation legally created under the laws of the commonwealth of Massachusetts, and located and trans-



acting business in the city and county of W., in said commonwealth, all citizens of the State of Massachusetts.

And thereupon your orator complains and says: That one S. H., of N., in said county of W., and commonwealth of Massachusetts, on or about the fourteenth day of October, A. D. 1839, was seised in fee-simple of, or otherwise well entitled to, certain real estate situated in said N., particularly described in certain deeds of conveyance of the same to said S. H.—one from J. F. and S. W., dated December 17, 1821, and one from J. E., dated October 11, 1822, recorded in the Registry of Deeds for the county of W., book 242, page 32; also a deed from J. E. to said S. H., dated May 3, 1825, recorded in said Registry of Deeds, book 248, page 457, copies of which deeds are hereunto annexed, and made a part of this bill marked ———.

And your orator further shows, that the said S. H., on or about said fourteenth day of October, A. D. 1839, made a conveyance of said premises, by way of mortgage, to one H. M. H., of B., in the county of S., and commonwealth of Massachusetts, to secure the repayment of a sum of money, with interest then due from the said S. H. to the said H. M. H.; and that subsequently, and on or about the seventh day of March, A. D. 1847, the said H. M. H. transferred and assigned all his interest in said mortgage deed, and in the premises therein described, and in the debt thereby secured, to the defendants. Copies of said mortgage deed, and of the assignment thereof, are hereunto annexed, marked, etc., and made a part of this bill.

And your orator further shows, that after the making of the said transfer, and on the third day of December, A. D. 1849, the said defendants entered into the possession of the said mortgaged premises, or into the receipt of the rents and profits thereof, and have ever since continued in such possession and receipt.

And your orator further shows, that since the said mortgaged premises have been in the possession of the defendants, the mills and principal buildings thereon have been destroyed by fire, and that the same were insured by the said S. H., who occupied said premises under lease from said defendants for

the benefit of said defendants, as further security for said mortgage debt, and that large sums have been paid to said defendants, on said policies, and that they still hold other policies upon the machinery in said mills, which was also destroyed by fire, which policies have been assigned to said defendants as further security for, and in payment of, said mortgaged debt, and that the whole amount of said policies is sufficient to cancel the greater part, if not the whole, of the residue of said debt, which had not otherwise been paid by said S. H., and that if a just account were taken of such payments, and of the sums received, or to be received, on said policies, which are now due and payable, and of said rents and profits received by said defendants, the whole of said mortgage debt would be found to be justly paid and discharged.

And your orator further shows, that on the —— day of ——, A. D. 184—, the equity of redemption which the said S. H. retained and owned in said property was transferred to one A. W. P., by assignments in the course of proceedings under the insolvent law of said commonwealth of Massachusetts, to which the said S. H. was a party, and that said A. W. P., as such assignee of said S. H., by his deed dated the twenty-fourth day of June, A. D. 1844, conveyed said equity of redemption to your orator, a copy of which deed is hereunto annexed, marked, etc.

And your orator further shows, that being the owner of said right of redemption in said property, he has applied to said defendants and requested them to come to an account for the rents and profits of the said premises so received by them, and of the moneys received by them from said S. H., for the interest and principal of said debt, and from the said policies of insurance, and to deliver up the possession of said mortgaged premises to him, upon being paid what, if anything, should be found to be justly due to them upon said account, which your orator is and has been ready and willing to pay, and is ready to bring the same into court, if anything shall be found to be justly due to said defendants upon the proper taking of said account. And your orator well hoped that the said defendants would have complied with such requests, as in justice and

equity they ought to have done; but the said defendants, acting in concert with divers persons unknown to your orator, refuse to comply therewith, and insist upon holding possession of said estate, and foreclosing your orator's right of redemption therein, and retaining said policies, and the amounts received thereon, and said rents and profits, without accounting for the same.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and the said defendants may answer the premises, and that an account may be taken of what, if anything, is due to the said defendants for principal and interest on the said mortgage, and that an account may be taken of the rents and profits of the said mortgaged premises, which have been possessed or received by the said defendants, or by any other person or persons, by their order or for their use, or which, without their wilful default or neglect, might have been received; and also of all the sums that may have been paid by said S. H. or others towards the principal and interest of said mortgage debt; and also of the policies of insurance and other securities which the said defendants have received, and of the sums which they have or might have realized therefrom, on account of the principal and interest of said debt, and of the value of such policies and other securities now in their hands, on account of said debt, which they have not sold or turned into money; and that the said defendants be ordered to apply the same to the payment of said debt; and that, if it shall appear that said rents and profits, and the payments and the proceeds of said policies and other securities have been and are more than sufficient to pay the principal and interest of said mortgage debt, that the residue may be paid over to your orator; and that your orator may be permitted to redeem the said premises, your orator being ready and willing, and hereby offering to pay what, if anything, shall appear to remain due, in respect to the principal and interest on the said mortgage; and that the said defendants may be decreed to deliver up possession of the said mortgaged premises to your orator, or to such person as he shall direct, free from all encumbrances made by them, or any persons claiming under

them, and may deliver to your orator all deeds and writings in their custody or power relating to the said mortgaged premises; and that your orator may have such further and other relief in the premises as the nature of this case shall require, and to your honors shall seem meet.

May it please your honors to grant unto your orators the *subpœna* of the United States of America, to be directed to the said president, directors, and company of the W. Bank, thereby commanding them, at a certain day, and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, abide, and perform such order and decree thereon, as to your honors shall seem meet.

W. H.

*By his Solicitors, T. A. J. and B. F. B.*

*B. & B., Solicitors.*

## XXI. BILLS RELATING TO THE EXECUTION OF TRUSTS.

1. *Bill by an executor and trustee under a will, to carry the trusts thereof into execution.*<sup>1</sup>

[*Title and address.*]

Humbly complaining, show unto your honors the plaintiff C. R., of, etc., executor of the will and codicils of M. S., late of, etc., deceased, and also a trustee, devisee, and legatee named in said will and codicils, against J. G., of, etc., etc., and E., his wife, and B. S., of, etc., etc., and J. S. G., of, etc., etc., that the said M. S., at the several times of making her will and codicils hereinafter mentioned, and at the time of her death, was seised or entitled in fee-simple of or to divers messuages, lands, etc., of considerable yearly value, in the several counties of C. and

1 In pleading a trust concerning lands, it need not be alleged that it was created by writing; this will be presumed if the statute requires a writing in order to create such a trust as the bill alleges. *Lamb v. Starr*, Deady (U. S.) 350. Equity will enforce all lawful trusts. If a trust should be created for an illegal or fraudulent purpose, equity will not enforce it, nor, it seems, relieve the person creating it, by setting aside the conveyance. When, however, a trust is unlawful because forbidden by statute, the whole disposition is void. *Pom. Eq. Jur.* § 987.

D., and being so seised or entitled, and also possessed of considerable personal estate, the said M. S., on or about ———, made her last will and testament in writing, and which was duly signed and attested, and published by her, according to law, and thereby, after giving divers pecuniary and specific legacies and divers annuities, the said testatrix gave and devised unto the plaintiff all, etc. [*Stating the substance of the will.*] And the said testatrix afterwards, on or about ———, made a codicil to her said will, which was duly signed, attested, and published according to law, and thereby gave, etc., and in all other respects she thereby confirmed her said will and all other codicils by her theretofore made; as by said will and the said several codicils thereto, or the probate thereof, to which the plaintiff craves leave to refer, when produced, will appear. And the plaintiff further shows that the said testatrix M. S. departed this life on or about ———, without having revoked or altered her said will and codicils, save as such will is revoked or altered by the said codicils, and as some of the said codicils have been revoked or altered by some or one of such subsequent codicils; and the said testatrix at her death left the said E. G., formerly E. S., and the said B. S., her cousins and co-heiresses at law. And the plaintiff being by the said codicil of the ——— day of ———, appointed sole executor of the said will and codicils, has since her death duly proved the said will and codicils in the proper court, and taken upon himself the execution thereof. And the plaintiff further shows that the said testatrix, at the time of her death, was possessed of, interested in, and entitled unto considerable personal estate and effects, and amongst other things, she was entitled to an eighth share and interest in a certain copartnership trade or business of a tin-blower and tin-melter, which was carried on by the testatrix and certain other persons at ———, under the firm of S. F. & Co., in which the testatrix had some share of the capital, and which was a profitable business, and by the articles of copartnership under which the said business was carried on, the plaintiff, as the said testatrix's personal representative, is now entitled to be concerned in such share of the said business for the benefit of the said testatrix's estate; and she was also possessed of or entitled to certain

leasehold estates held by her for the remainder of certain long terms, etc. And the plaintiff further shows that he has possessed himself of some parts of the testatrix's personal estate, and has discharged her funeral expenses, and some of her debts and legacies, and the plaintiff has also, so far as he has been able, entered into possession of the said testatrix's estates, which she was seised of or entitled to at the times when she made her said will and codicils, and which consisted of, etc., being all together of the yearly value of \$ ———, or thereabouts, besides the said mansion-house, and besides the premises, which, by the said codicil, dated on ——— day of ———, are devised to the plaintiff for his own use and benefit; and the plaintiff is desirous of applying the said testatrix's personal estate and effects, not specifically bequeathed, in payment of the said testatrix's debts, and of her legacies now remaining unpaid, and of the annuities bequeathed by the said will and codicils, so far as the same will extend, and of paying the remainder thereof out of the rents and profits of the said real estates, and of applying the whole of the rents and profits, according to the directions of the said will and codicils, as in justice and equity ought to be the case. *But now so it is*, may it please your honors, that the said J. G. and E., his wife, B. S., and J. S. G., in concert with each other, make various objections to the plaintiff's applying the said personal estate, and the rents and profits of the said real estate, according to the directions of the said will and codicil; and the said defendants, J. G. and E., his wife, sometimes pretend, that by virtue of the said testatrix's will, they are entitled to the residue of the said testatrix's personal estate, not specifically bequeathed, including all her household estates, after payment of all her funeral expenses and debts, and that the said personal estate is not subject to the payment of the several legacies and annuities given by the testatrix's said will and codicils, but is exempt therefrom, and that all the said legacies and annuities ought to be paid out of the rents and profits of the said testatrix's real estates. Whereas the plaintiff charges the contrary of such pretenses to be true, and that the said personal estate is applicable to the payment of all the said testatrix's legacies and annuities, after satisfying all her funeral expenses and debts;

and the said J. G. and E., his wife, are desirous that the plaintiff, as the personal representative of the said testatrix, should, by means of the said testatrix's share of the capital employed in the said trade or business, carry on the said trade or business for the benefit of them and of the said testatrix's estate, but which the plaintiff cannot safely do without the direction and indemnity of this court; and the said J. G. alleges that he is not of ability to maintain and educate his said son, J. S. G., who is an infant of the age of ten years or thereabouts, and he therefore claims to have some part of the rents and profits of the said premises paid to him, for the maintenance and education of the said J. S. G.; and the plaintiff, under the circumstances aforesaid, is unable to administer the said personal estate, and to execute the trusts of the said real estates, without the directions of this honorable court, and the defendants are desirous of having a person appointed by this court to receive the rents and profits of the said real estates devised as aforesaid by the said fifth codicil, to which the plaintiff has no objection. In consideration whereof, etc. *To the end*, therefore, etc.

And that the trusts of said will and codicil may be performed and carried into execution by and under the direction of this court, and that an account may be taken of the said testatrix's personal estate and effects, not specifically bequeathed, and of her funeral expenses and debts, and of the legacies and annuities bequeathed by the said will and codicils, the plaintiff being ready and hereby offering to account for all such parts of the said personal estate as have been possessed by him, and that the said personal estate may be applied in payment of the said funeral expenses, debts, and legacies and annuities in a due course of administration, and that the clear residue, if any, of the said personal estate may be ascertained and paid to the said defendants, J. G. and E., his wife, in her right; and in case it shall appear that the said personal estate, not specifically bequeathed, is not sufficient for payment of all the said funeral expenses, debts, legacies, and annuities, or that any parts thereof are not payable out of such personal estate, then that proper directions may be given for payment of such deficiency, or of such parts thereof as are not payable out of the said per-

sonal estate, according to the trusts of the said term of one hundred years, vested in the plaintiff as aforesaid, and that an account may be taken of the rents and profits of the said real estates, comprised in the said term received by or come to the hands of the plaintiff, and that the same may be applied according to the trusts of the said term; and that proper directions may be given touching the effects specifically bequeathed by the said will and codicils as heirlooms, and that proper inventories may be made thereof; and that all necessary directions may be given touching the application of a sufficient part of the rents and profits of the said real estates to the maintenance and education of the said J. S. G., in case this court shall be of opinion that any allowance ought to be made for that purpose; and that a proper person may be appointed by this honorable court to receive the rents and profits of the said real estates devised as aforesaid by the said fifth codicil. [And for further relief.] May it please, etc.

[*Pray subpoena against J. G. and E., his wife, B. S., and J. S. G.*]

2. *Bill to remove trustees, one refusing to act, and the other, a prisoner for debt, having applied part of the trust moneys to his own use. Prayer for an account, and for an injunction to restrain them from any further interference; also for a reference to a master to appoint new trustees, and for a receiver.*<sup>1</sup>

[*Title and address.*]

Humbly complaining, show unto your honors your orator and oratrixes, J. E., of, etc., and S., his wife, and S. E., the younger, spinster, the daughter and only child of your orator and oratrix, J. E. and S., his wife, that by indenture bearing date ———, and made between your orator and oratrix, J. E. and S., his wife, of the one part, and N. B., of, etc., and R. P., late of, etc., but now a prisoner in the jail of ——— (the de-

<sup>1</sup> The power of equity to remove trustees is confined to cases of actual express trusts. The court will remove a trustee who wishes to be discharged, on his own application; and it will remove a trustee who has permanently changed his residence to another country, or has absconded, or has been guilty of some breach of trust or violation of duty, or has become insolvent, or is incapable through age or other infirmity of performing the duties of the trust. Pom. Eq. Jur. § 1066.



defendants hereinafter named) of the other part, after reciting that, etc. (*Stating the indenture.*) As by the said indenture, to which your orator and oratrixes crave leave to refer, when produced, will appear. And your orator and oratrixes further show unto your honors that the said R. P. hath principally acted in the trusts of the said indenture, and hath by virtue thereof, from time to time, received considerable sums of money and other effects, but the said R. P. hath applied only a small part thereof upon the trusts of the said indenture, and hath applied and converted the residue thereof to his own use, and in particular the said R. P. hath within a few months past, received a considerable sum from the estate and effects of the said C. E., the whole of which he applied to his own use. And your orator and oratrixes further show that they have by themselves and their agents repeatedly applied to the said R. P. and N. B. for an account of the said trust property received and possessed by them, and of their application thereof. And your orator and oratrixes well hoped that the said defendants would have complied with such their reasonable request, as in justice and equity they ought to have done. But now so it is, etc. (*See form No. , p. .*) And the said defendants pretend that the trust property and effects possessed and received by them were to an inconsiderable amount, and that they have duly applied the same upon the trusts of the aforesaid indenture. Whereas your orator and oratrixes charge the contrary of such pretenses to be the truth, and that so it would appear if the said defendants would set forth, as they ought to do, a full and true account of all and every the said trust property and effects which they have respectively possessed and received, and of their application thereof. And your orator and oratrixes charge that the said R. P. threatens and intends to use other parts of the said trust property, and to apply the same to his own use, unless he is restrained therefrom by the injunction of this honorable court. And your orator and oratrixes further charge that he, as well as the said N. B., ought to be removed from being trustees under the said indenture, and that some other persons ought to be appointed by this honorable court as such trustees in their place and stead, and that in the

mean time some proper person ought to be appointed to receive and collect the said trust property. All which actings, etc.

And that the said defendants may answer the premises ; and that an account may be taken of all and every the said trust property and effects which have, or but for the wilful default or neglect of the said defendants, might have been received by them, or either of them, or by any other person or persons, by their or either of their order, or to their or either of their use ; and also an account of their application thereof ; and that the said defendants may respectively be decreed to pay what shall appear to be due from them upon such account ; and that the said defendants may be removed from being trustees under the said indenture, and that it may be referred to one of the masters of this honorable court to appoint two other persons to be the trustees under the said indenture in their place and stead ; and that in the mean time some proper person may be appointed to receive and collect the said trust estate and effects, and that the said defendants may be restrained by the order and injunction of this honorable court from any further interference therein. [*And for further relief.*] May it please, etc.

3. *Bill for the appointment of a new trustee under a marriage settlement in the room of one desirous to be discharged, there being no such power therein contained.*

[*Title and address.*]

Humbly complaining, show unto your honors your orators and oratrixes, I. M. P., of, etc., and E., his wife, and A. P. and C. P., infants under the age of twenty-one years, by the said I. M. P., their father, and next friend, and S. N. M., of, etc. (*the other trustees under the settlement*), that by certain indentures of three parts, and made or expressed to be made between, etc. (*Stating the indenture of settlement.*) But the said indenture contained no power or authority to appoint a new trustee in the place or stead of either of the said trustees therein named, who should decline to act in the said trusts, or be desirous to be removed therefrom. As in and by the said indentures, etc. And your orators and oratrixes further show unto your honors that the said intended marriage was soon afterwards

had and solemnized between your orator I. M. P. and your oratrix E. P.; and that your orator and oratrix, A. P. and C. P., are the only children of the said marriage. And your orators and oratrices further show that the said defendant I. P. L. declines to act in the trusts of the said indenture, and is desirous to be discharged therefrom, but by reason that no power is reserved in the said indenture for the appointment of a new trustee, your orators and oratrices are advised that he cannot be discharged from such trusts, nor any new trustee appointed without the aid of this honorable court. To the end, therefore, that the said defendant I. P. L. may, upon his corporal oath, etc.

And that the said defendant may answer the premises; and that it may be referred to one of the masters of this honorable court to appoint a new trustee under the said marriage settlement, in the place and stead of the said defendant; and that the said defendant may be directed to join in such instrument or instruments as may be necessary for conveying or releasing the said trust premises to your orator S. N. M. and such new trustee upon the trust of the said settlement; and that thereupon the said defendant may be discharged from the trusts of the said indenture. [*And for further relief.*] May it please, etc.

## XXII. BILLS TO RESTRAIN WASTE.<sup>1</sup>

### 1. *Bill by a landlord against a lessee for years to prevent waste.*

[*Title and address.*]

Humbly complaining, sheweth unto your honors your orator A. B., of, etc. That your orator before and at the time of making the indenture hereinafter mentioned was seised in his demesne as of fee, of and in certain tenements, with the appurtenances, situate at L., in the county of N., hereinafter particularly described; and being so seised by a certain indenture, bearing date the —— day of ——, in the year ——, and made between your orator of the one part, and C. D., of, etc. (the defendant hereinafter named), of the other part, your orator did demise, lease set, and to farm let, unto the said C. D., his execu-

<sup>1</sup> An injunction will be granted in all cases where an action at law would lie to recover possession of the land wasted, or to recover damages. It will also be granted to restrain threatened waste, although none has actually been committed. Pom. Eq. Jur. § 1343.

tors, administrators, and assigns, all, etc. [*Here describe from the lease the subject of the demise.*] To hold the same, with the appurtenances, unto the said C. D., his executors, administrators, and assigns, from the — — day of — —, then last past, for the term of — — years thence next ensuing, at the yearly rent of £ — —; and the said C. D. did thereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree, with your orator, his heirs and assigns, that he, the said C. D., his executors, administrators, or assigns, would, during the said term, keep the said premises in good repair, and manage and cultivate the said farm and lands in a proper, husband-like manner, according to the custom of the country, as by the said indenture of lease, reference being thereunto had, will more fully appear. And your orator further sheweth unto your honors, that the said C. D., under and by virtue of the said indenture, entered upon the said demised premises, with the appurtenances, and became and was possessed thereof for the said term, so to him granted thereof by your orator as aforesaid. And your orator further sheweth unto your honors that at the time the said C. D. entered upon the said premises, the same were in good repair and condition, and your orator hoped the said C. D. would so have kept the same, and have cultivated the said lands in a proper and husband-like manner according to the custom of the country, and that such part of the said premises as consisted of ancient meadow or pasture ground, would have remained so, and not have been plowed up, and converted into tillage; and that no waste would have been committed on the said premises. But now so it is, may it please your honors, the said C. D., combining, etc., pretends that the said premises now are in as good repair as when he entered in or to the same, and that he has cultivated the said farm and lands in a proper and husband-like manner, and that no waste has been committed by him thereon. Whereas your orator charges, that the said premises, and the buildings, out-houses, gates, stiles, rails, and fences, were in a good and perfect state and condition when the said C. D. entered upon the said premises, but now are very ruinous and bad, and the land very much deteriorated, from the wilful mismanagement and

improper cultivation thereof by the said C. D., who has plowed up certain fields called ———, containing respectively ——— acres, and has otherwise committed great spoil, waste, and destruction in, upon, and about the said premises; and your orator further charges, that the said C. D. ought to put the said premises into the same condition they were in when he entered thereon, and to make your orator a reasonable compensation for the waste and damage done or occurred thereto; and that the said C. D. ought to be restrained by the order and injunction of this honorable court from plowing up the remaining pasture fields, part of the said demised premises, and particularly the fields called ——— and ———, and containing respectively ——— acres, which he threatens to do, and also restrained from committing any further or other waste, spoil, or destruction, in and about, or to the said estate and premises, or any part thereof. All which, etc. And that the said C. D. may be compelled by the decree of this honorable court to put the said premises into such repair and condition, in every respect, as far as circumstances will permit, as the same were in when he entered upon the same, under and by virtue of such demise as aforesaid; and may also be decreed to make a reasonable compensation to your orator for all waste done, committed, or suffered by him on the said premises, and all damage occasioned thereto by his mismanagement or neglect (your orator hereby waiving all pains and penalties incurred by the said C. D. on account of committing waste on the said premises), and that he may be decreed to keep the said premises in good and sufficient repair and condition during the remainder of his interest therein, and to manage and cultivate the said farm and lands in a proper and husband-like manner, according to the custom of the country, and that he may be likewise restrained by the order and injunction of this honorable court from plowing up the said remaining pasture fields, forming part of the said demised premises, and particularly the said fields called ——— and ———, and from committing or permitting any further waste or spoil, in, on, or to the said demised premises, or any part thereof. [*And for general relief.*] May it please,

etc. [*End by praying an injunction in the terms of the prayer, and by praying process of subpoena, against the said C. D.*]

2. *Bill by landlord against lessee for years, who had plowed up lands contrary to the terms of his lease, and had suffered the farm to continue out of repair.*

[*Title and address.*]

Humbly complaining, sheweth unto your honors your orator A. B., of ———, that your orator being seised in fee-simple of or otherwise well entitled unto the premises hereinafter described, did by a certain indenture bearing date ———, and made between your orator of the one part, and C. D., of ——— (the defendant hereinafter named), of the other part, demised, lease set, and to farm let, unto the said C. D., his executors, administrators, and assigns, all that messuage, etc. [*Describing the premises as in the lease.*] To hold the same with their appurtenances unto the said C. D., his executors, administrators, and assigns, from the ——— day of ——— then last past, for the term of ——— years thence next ensuing, at the yearly rent of \$———, payable quarterly as therein mentioned, and under and subject to the covenants, stipulations, and agreements therein contained on the part of the said C. D., his executors, administrators, and assigns, to be observed and performed. In which said indenture is contained a covenant on the part of the said C. D. for himself, his heirs, executors, administrators, and assigns, that he, the said C. D., his executors, administrators, and assigns, should and would, etc. [*Stating shortly the covenant to keep the buildings and premises in repair, and also to manage and cultivate the lands.*] As by the said indenture to which your orator craves leave to refer, when produced, will more fully appear. And your orator further sheweth that the said C. D. took possession of all the said demised premises, and that the same were then in good repair and condition, but have since become very ruinous and bad, and the said lands very much deteriorated from the wilful mismanagement and improper cultivation thereof, by or on the part of the said C. D., and that he has plowed up certain fields called ———, containing ——— acres, contrary to the terms of the said lease,

and has otherwise committed great spoils, waste, and destruction, in, upon, and about the said demised messuage, etc., and premises. And your orator further sheweth that he hath frequently, by himself and his agents, applied to the said C. D. and requested him to put the said messuage, etc., and all the buildings, fences, gates, stiles, and rails, into good repair, and to keep the same in good and sufficient repair during the remainder of the said term, and to make satisfaction to your orator for all the damage done to the said estate, by his mismanagement or neglect in the management thereof, according to the terms of the said lease and course of husbandry practiced in the neighboring country; and your orator hath also in like manner requested him not to plow up any other of the said lands demised to him as aforesaid, which he is not at liberty to plow, according to the terms of the said lease. And your orator hoped that the said C. D. would have complied with such applications and requests, as in justice and equity he ought to have done. But now so it is, etc., the said C. D. absolutely refuses so to do; and he at times pretends that the said messuage or tenement, and all the out-houses and out-buildings thereunto belonging, and all the buildings, fences, gates, and stiles, on the said lands, have been constantly, during his possession thereof, and now are, in good repair and condition, and that he hath never plowed up any part of the said demised lands which he was not at liberty to plow by the terms of the said lease, and the course of husbandry used and approved in the neighborhood thereof, and that he hath never in any manner neglected the manuring or taking care of any part thereof, but that he hath constantly used and employed, cultivated and manured all such lands in a proper, regular, and careful manner according to the terms of the said lease, and a good course of husbandry used and practiced in the neighboring country, and that all the said demised premises are in as good plight and condition in all respects as the same were when he entered thereon. Whereas your orator charges the contrary of all such pretenses to be the truth. And your orator further charges that the said farm and premises are now, from the neglect and gross mismanagement of the said defendant, worth to be sold the sum of \$—— less

than the same were worth to be sold when the said C. D. first took possession thereof, and that it would cost the sum of \$—— and upwards to put the same into as good plight and condition as the same were in at the time of the date of the said indenture of lease. And your orator further charges that the said C. D. ought to put the said demised messuage, etc., and premises into good repair and condition, and to make a reasonable compensation to your orator, for the waste and damage done or arisen thereto. And your orator charges that the said defendant threatens and intends to plow up the other or remaining pasture fields called ——, part of the said demised premises, and that he ought to be restrained therefrom, and from committing any further or other waste, spoil, or destruction, in, upon, or to the said farm, lands, and premises, or any part thereof. All which actings, etc.

And that the said defendant may be compelled by the decree of this honorable court to put the said messuage, etc., and premises into good and sufficient repair, and to make satisfaction to your orator for all waste done, committed, permitted, or suffered by him, on the said farm, lands, and premises, and all damage done by him, or occasioned thereto, by his mismanagement or neglect (your orator hereby waiving all forfeitures and penalties incurred by the said defendant on account, or in respect of the waste done or committed by him on the said demised premises). And that the said defendant may be decreed to keep the said farm, lands, and premises in good and sufficient repair and condition during the continuance of his interest therein, and to manage and cultivate the said farm and lands in a proper and husband-like manner, according to the terms of the said lease, and the custom of the country. And that he may be restrained by the injunction of this honorable court from plowing up the said remaining fields forming part of the said demised premises, and particularly the said fields called ——, and from committing or permitting any further or other waste or spoil on or to the said demised premises, or any part thereof, and that all proper directions may be given for effectuating the purposes aforesaid. [*And for further relief.*] May it please, etc.



## CHAPTER III.

## ORIGINAL BILLS NOT PRAYING RELIEF.

XXIII. BILLS TO PERPETUATE TESTIMONY.<sup>1</sup>

1. *Bill by devisee in fee in possession, to perpetuate the testimony of the witness to a will.*

[*Title and address.*]

Humbly complaining, sheweth unto your honors your orator T. H., of, etc., brother of the half blood and devisee named in the last will and testament of T. R., of, etc., deceased, that the said T. R. was in his lifetime, and at the time of his death, seised or entitled to him and his heirs of or to divers freehold estates, situate in the several places hereinafter mentioned, and divers other places, of considerable yearly value in the whole, and being seised or entitled, and being of sound and disposing mind, memory, and understanding, he made his last will and testament in writing, bearing date, etc., which was duly executed by him, in the presence of, and attested by three credible persons, whose names are [*here insert the names of the subscribing witnesses*], and which will, with the attestation thereof, is in the words following, that is to say: [*stating the will verbatim.*] And your orator further sheweth that the said T. R. afterwards, and on or about ———, departed this life without revoking or altering his said will, or any part thereof, whereupon your orator, by virtue of the said will, became entitled in

<sup>1</sup> A suit to perpetuate testimony could only be maintained where plaintiff had at the time some right, vested or contingent, to which the testimony would relate; but such right could not then be investigated, established, or defended by an action at law. As the foundation of the suit, the plaintiff in it, not yet being in possession of the property in question, might have a future interest, to take effect only upon the happening of some future or perhaps contingent event; or he might have an immediate present interest, being in possession of the property, and his possession not yet actually disturbed, but threatened with disturbance or contest by the defendant at some future time; in either of which cases he could immediately bring no action at law to maintain or defend his right. Pom. Eq. Jur. § 211.

fee-simple to all his said freehold estates, subject as to such part thereof as aforesaid, to the payment of so much of the funeral expenses, debts, and legacies of the said T. R. as his personal estate may fall short to pay; and your orator accordingly, soon after the death of the said T. R., entered upon and took possession of all the said estates, and is now in possession and receipt of the rents and profits thereof and in the possession and enjoyment thereof. And your orator well hoped that he and his heirs and assigns would have been permitted to enjoy the same quietly without any interruption from any person whomsoever. But now so it is, may it please your honors, that T. H., of, etc., who claims to be cousin and heir at law of the said T. R., alleging that he is the only or eldest son of T. H. and M., his wife, both deceased (which said M. H., as is also alleged, was the only child of S. R., who, as is likewise alleged, was the only brother of the father of the said T. R. that left any issue), combining and confederating with divers persons unknown to your orator, pretends that the said T. R. did not make such last will and testament in writing as aforesaid, or that he was not of sound and disposing mind and memory at the making thereof, or that the same was not executed in such manner as by law is required for devising real estates; and therefore he insists that your orator hath not any right or title to the real estates late of the said T. R., or any part thereof, but that on his death the same descended unto him the said T. H., as his heir at law. Whereas your orator charges the contrary of such pretenses to be true. But nevertheless the said T. H. refuses to contest the validity of the said will during the lifetime of the subscribing witnesses thereto, and he threatens that he will hereafter dispute the validity of the said will when all the subscribing witnesses thereto are dead, whereby your orator and his heirs and assigns will be deprived of the benefit of their testimony. All which pretenses of the said confederate are contrary to equity and good conscience, and tend to injure and oppress your orator in the premises, in consideration whereof and forasmuch as your orator cannot perpetuate the testimony of the subscribing witnesses to the said will, without the assistance of a court of equity. To the end, therefore, that the

said T. H. may show, if he can, why your orator should not have the testimony of the said witnesses perpetuated.

And that your orator may be at liberty to examine his witnesses with respect to the execution and attestation of the said will and sanity of mind of the said T. B. at the making of the same, so that their testimony may be perpetuated and preserved. May it please, etc. [*This bill should not pray for relief.*]

[*Pray subpoena against T. H.*]

#### XXIV. BILLS TO TAKE TESTIMONY DE BENE ESSE.<sup>1</sup>

##### 1. *Bill to take the testimony of witnesses de bene esse for various causes.*

[*Title and address.*]

Humbly complaining, sheweth unto your honors A. B., of ———, that an action at law is now pending in the court of ———, wherein your orator is plaintiff, and C. D., of ———, is defendant [or the reverse], touching and concerning [*here describe the cause of action*] which has not yet been committed to a jury; and your orator further shows that one E. F., of ———, of the age of seventy years, or upwards [*or, without stating the age, a person of infirm health, or laboring under a certain disease, or who is about to depart out of the jurisdiction of the said court, or who is the sole witness to the fact of ———*], so that his testimony is in danger of being lost to your orator at the said trial, by reason of death [*or absence*], is a material and important witness for your orator, inasmuch as the said E. F. is acquainted with the fact (*here state the witness' expected evidence*) [*or, inasmuch as the said E. F. is the sole person who has knowledge of the fact of ———*], which fact it is material and necessary for your orator to prove on the trial of the said action at law.

<sup>1</sup> This mode of taking testimony through an equitable suit has become entirely obsolete throughout the United States. Ample powers were long ago conferred by statutes upon the various courts of law, to permit and direct the testimony of aged, or infirm, or other witnesses, to be taken preliminary to the trial in any pending proceeding, under all the circumstances which would have authorized a suit to take the testimony *de bene esse*; and also to permit and direct the issuing of commissions to other States and to foreign countries, for the purpose of taking the testimony of absent witnesses under like circumstances. These statutory methods, being more simple, speedy, and efficacious, have wholly superseded this branch of the auxiliary jurisdiction of equity. Pom. Eq. Jur. § 215.

In consideration whereof, and forasmuch as your orator cannot be secure of having the testimony of the said witness, at the trial of the said action, without the aid of a court of equity, in causing the same to be taken *de bene esse*, and that your orator may be at liberty to have the same so taken, under a commission or commissions issuing out of this honorable court. *May it please your honors* to grant unto your orator a writ of subpoena to be directed to the said C. D., thereby commanding him, at a certain day, and under a pain to be therein limited, personally to be and appear before your honors in this honorable court, and then and there full, true, direct, and perfect answer make, to all and singular the premises, and to show cause, if he can, why your orator should not have the testimony of the said witness taken *de bene esse*.

## XXV. BILLS FOR DISCOVERY.<sup>1</sup>

### 1. *Bill for discovery in aid of an action at law.*<sup>2</sup>

[*Title and address.*]

Humbly complaining, show unto your honors the plaintiffs

1 Modern legislation has greatly interfered with the practical exercise of the auxiliary jurisdiction for a discovery by introducing simpler and more efficacious methods in its stead, and by thus rendering a resort to it unnecessary and even inexpedient. Pom. Eq. Jur. § 193. In some of the States the suit for "discovery," properly so called, is expressly abolished by statute; and in all of them it is utterly inconsistent with both the fundamental theory and with the particular doctrines, rules, and methods of the reformed procedure. In the other commonwealths, where the common law and the equity jurisdictions are still preserved distinct from each other, whether possessed by the same court, or, as in a very few States, by separate tribunals, the statutes permit the parties to all civil actions and proceedings, both at law and in equity, to testify in their own behalf, and to be examined as witnesses, in the ordinary manner, on behalf of their adversaries; and also provide summary and simple modes for compelling the disclosure and production and inspection, by the parties to any action, of documents, books, and the like material, to the opposite party, for maintaining his cause of action or defense. Notwithstanding these great changes made by statutes, which seem to remove the very foundation for any interposition by equity, it has generally been held that the legislature has not abridged nor affected the auxiliary equitable jurisdiction to entertain suits for mere discovery of evidence and production of documents, and that such equitable jurisdiction still exists where not expressly abolished by the statutes. Pom. Eq. Jur. § 193.

2 An averment of necessity for discovery is not essential, and a demurrer will not be sustained for want of it, if the discovery sought is in aid of the averments in the bill. *Lancy v. Randlett*, 6 Am. St. Rep. 169. But a bill for discovery is insufficient if it fails to show the

P. M., of etc., J. A., of etc., and J. R., of, etc., that by an indenture of assignment bearing date ———, and made between J. G. and J. W., therein described, of, etc., of the first part, the several persons who had thereunto set their hands and affixed their seals, creditors of the said J. G. and J. W., as copartners as aforesaid, or of the said J. G., on his own separate account, of the second part, and the plaintiffs of the third part, they, the said J. G. and J. W. (amongst other things), bargained, etc. [*setting out that part showing the assignment to the plaintiffs, and particularly the clause which gives them power to sue*], as in and by, etc. And the plaintiffs further show unto your honors, that at the time of the execution of the said indenture, there was justly due and owing to the said J. G. and J. W., on their partnership account, from R. K., of, etc. (the defendant hereinafter named), the sum of \$——, being the balance of an account between the said J. G. and J. W., the particulars whereof are set forth in the schedule hereto. And the plaintiffs further show that they have repeatedly applied to the said R. K. to pay to them, as such trustees as aforesaid, the said sum of \$——, with which just and reasonable requests the plaintiffs well hoped the said defendant would have complied, as in justice and equity he ought to have done.

*But now so it is, etc.*, he has absolutely refused so to do; and the plaintiffs have therefore been compelled to commence an action in the names of the said J. G. and J. W. against the said defendant to compel the payment of the said balance: and the plaintiffs charge that the said defendant has pleaded a set-off in the said action, and has delivered a particular of such set-off, which, as far as it extends, to the date of the said assignment to the plaintiffs, corresponds in substance with the creditor side of the account set forth in the schedule hereto; but the said defendant has added thereto three articles for copper delivered in the year ———, for which he claims credit in the said action. Whereas the plaintiffs charge that the said defendant, at or about the time of the execution of the said assignment to the plaintiffs, was apprised thereof, or had some reason to know, believe, loss of a missing deed, and that such loss was not the fault of the orator. But such bill is amendable on terms. *Lancy v. Randlett*, 6 Am. St. Rep. 169.

or suspect, and did know, believe, or suspect, that the said J. G. and J. W. had made such assignment, or some assignment of their copartnership property to the plaintiffs or to some trustees for the benefit of their creditors. And the plaintiffs further charge that the said copper was delivered at ———, which had belonged to the said J. G. and J. W., and had been comprised in the said assignment to the plaintiffs, and had been afterwards sold by the plaintiffs to the said J. G.; and the said J. G. applied to the said defendant to purchase the said copper on his, the said defendant's credit, or to guaranty the payment for the said copper to the person from whom it was bought, by reason that the circumstances of the assignment to the plaintiffs being known, the said J. G. could not obtain credit for the said copper in his own name alone; and the said defendant for that reason lent his credit to the said J. G. for the purchase of the said copper, or guarantied the payment thereof, trusting to the personal responsibility of the said J. G. And the plaintiffs further charge that the said defendant has also added to his said particular of set-off a sum of \$———, for a year and a half's wages for one J. B. C. Whereas the plaintiffs charge that the said defendant has no just right to any such demand against the plaintiffs as trustees under said assignment; and the said defendant refuses to set forth how he makes out such his claim, and when and up to what time he computes the said wages. And the plaintiffs charge that they are advised that they cannot safely proceed in the said action so commenced by them as aforesaid in the names of the said J. G. and J. W., without a discovery of the circumstances hereinbefore stated from the said defendant. *To the end*, therefore, etc.

And that the said defendant may set forth how he makes out such his said claim, and when and up to what time he computes the said wages, and whether the plaintiffs can safely proceed in the said action so commenced by them as aforesaid, in the names of the said J. G. and J. W., without a discovery of the circumstances hereinbefore stated from the said defendant. And that the said defendant may make a full and true discovery of all and every the matters aforesaid. May it please, etc.

[*Pray subpoena against R. K.*]

## CHAPTER IV.

## BILLS NOT ORIGINAL.

XXVI. SUPPLEMENTAL BILLS.<sup>1</sup>1. *Supplemental bill against the assignee of a bankrupt defendant.*

[Title and address.]

Humbly complaining, sheweth unto your honors your orators, A. B. and C. D., of ———, that your orators did in or as of ——— term ——— exhibit their original bill of complaint in this honorable court against B. L., of ———, praying that an account might be taken of the personal estate, effects, etc. And your orators further show that the said defendant, having been served with process to appear, appeared accordingly and put in his answer to the said bill, and your orators replied to the said answer, but before any further proceedings were had in the said cause, and on or about the ——— day of ———, the

1 New averments are properly alleged in a supplemental bill, and in it any party may be brought before the court who has been omitted to be introduced at the stage of the cause at which an amendment for that purpose may be made. *Dow v. Jewell*, 45 Am. Dec. 371. Thus, where a complainant had no ground for proceeding originally, but subsequently becomes entitled to relief, he should file a new bill. *Caudler v. Pettit*, 19 Am. Dec. 890. And the assignee of complainant must make himself a party by supplemental bill: he cannot proceed in the name of the original party. *Mills v. Hoag*, 31 Am. Dec. 271. But where a complainant has assigned his interest in the subject-matter of the litigation pending the suit, his assignee cannot on a supplemental bill be substituted to his rights: he must file an original bill in the nature of a supplemental bill. *Tappan v. Smith*, 5 Biss. (U. S.) 73.

New oral testimony, tending merely to corroborate evidence on the one side, or to contradict evidence on the other, on the points in issue, is not a sufficient foundation for a supplemental bill. No new evidence is a sufficient foundation for a supplemental bill, unless it be of such a nature that it would, if unanswered, require a reversal of the decree. *Jenkins v. Eldridge*, 3 Story (U. S.) 299.

A bill stating previous proceedings of the court, not with a view to their alteration or amendment, but as a portion of the facts out of which the complainant's equity arises, is an original bill, though it is alleged to be a supplemental bill. *Brooks v. Brook*, 38 Am. Dec. 310.

After a case has been argued and has been under advisement, it is proper for the Circuit Court to deny the motion for leave to file a further bill, making an essential change in the character and objects of the cause, by way of supplement and amendment. *Snead v. McCoull*, 12 How. (U. S.) 407.

said B. L. hath been duly found and declared bankrupt; and E. D., of ———, the defendant hereinafter named, having been since duly chosen assignee of the estate and effects of the said bankrupt, there have been duly conveyed and assigned all the estate and effects late of the said bankrupt to the said E. D.; and therefore your orator is advised that he is entitled to the same relief against the said E. D. as he would have been entitled to against the said B. L. if he had not become bankrupt. To the end, therefore, etc.

And that your orators may have the full benefit of the said suit and proceedings therein against the said E. D., and may have the same relief against him as your orators might or could have had against the said B. L. in case he had not become bankrupt; or that your orators may have such further or other relief in the premises as to your honors shall seem meet. May it please, etc.

2. *Supplemental bill to an original and amended bill filed by a lessee for the specific performance of an agreement to grant a further lease, stating that defendant has brought an ejectment against plaintiff, and praying an injunction to restrain his proceeding at law.*

[Title and address.]

Humbly complaining, sheweth unto your honors your orator J. K., of, etc., that in or as of ——— term ——— your orator exhibited his original bill of complaint in this honorable court against H. B. S., and which said bill hath been amended by order of this honorable court, thereby praying that the said defendant might be decreed specifically to perform his agreement with your orator touching the lease of the farm and premises in the said bill mentioned, and to grant your orator a lease thereof for ——— years, commencing from the expiration of his former lease, at the yearly rent of \$———, your orator being willing and ready to do and perform everything on his part required to be done and performed in pursuance of the said agreement. And your orator further sheweth that the said defendant appeared and put in his answer to the said original bill. As by the said bill and answer now remaining as of



record in this honorable court, reference being thereto had, will appear. And your orator further sheweth by way of supplement, that since the filing of the said original bill the said defendant hath caused an action of ejectment to be commenced in the court of ———, for the purpose of turning your orator out of possession of the said farm and premises, and the said action is still depending in the said court. And your orator being advised that the said defendant cannot support such action, and that your orator is entitled to a specific performance of the said agreement as prayed by his said amended bill, he has, by himself and his agents, several times applied to, and requested the said defendant to desist from proceeding in the said action, and he was in hopes that he would have complied with such fair and reasonable requests, as in justice and equity he ought to have done. But now so it is, may it please your honors, that the said H. B. S. refuses to comply with your orator's said requests, and insists upon proceeding in his said action, and to turn your orator out of possession of the said farm and lands, to the manifest wrong and injury of your orator in the premises. To the end, therefore, that, etc. (*See form No. , p. , and interrogate to the statements.*)

And that the said defendant may be restrained by the injunction of this honorable court from proceeding in the said action, and from commencing any other action or proceeding at law for the purpose of turning your orator out of possession of the said farm and lands. [*And for further relief.*] May it please, etc. A. C.

[*Pray subpoena and injunction against H. B. S.*]

3. *Supplemental bill in a patent cause, stating the fact of an extension since the filing of the original bill.*

[*Title and address.*]

E. H., Jr., of B., in the State of N. Y., and a citizen of the State of N. Y., brings his supplemental bill against C. W. W., of said Massachusetts.

And thereupon your orator complains and says that he filed his original bill against the defendants in this court August 9, 1859, wherein he prayed for a discovery, account, payment of

profits, and an injunction to restrain the said defendants from infringing on your orator's patent granted to him by the United States of America, for improvement in sewing machines, dated September 10, 1846 ; and for other relief, as stated in his said original bill.

And your orator further shows, that since the filing of his said original bill, namely, on the eighth day of September, in the year 1860, upon the application of your orator, and after due proceedings had in all respects as required by law, the commissioner of patents granted the extension of said patent for the term of seven years from and after the expiration of the first term thereof, viz., the tenth day of September, 1860, and made a certificate of such extension thereon, and entered the same on record in the patent office in due form of law ; and thereupon the said patent was renewed and extended, and now has the same effect in law as though it had been originally granted for the term of twenty-one years, as in and by said certificate, or a certified copy thereof here in court to be produced, will more fully appear. Yet the said defendant, well knowing the premises, but contriving how to injure your orator, and without his consent or allowance, and without right and in violation of said letters patent and your orator's exclusive rights, secured to him as aforesaid, from September 1, 1857, has made, used, or vended, and still does make, use, or vend to others to be used in said district, and in other parts of the United States, a large number of sewing machines, but how many your orator cannot state, but prays that the defendant may discover and set forth, each embracing substantially the improvement in sewing machines, or a material part thereof, patented by your orator as aforesaid, and thereby the said defendant has infringed, and still does infringe, and cause your orator to fear that in future he will infringe upon the exclusive rights and privileges intended to be secured to your orator in and by his said letters patent.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein, and in his said original bill prayed ; and may, under oath, and according to his best and utmost knowledge, remembrance, informa-

tion, or belief, full, true, direct, and perfect answer make to all and singular the premises, and more especially may answer, discover, and set forth, whether during any and what period of time since September 1, 1857, and where he has made, used, or vended to others to be used, for any and what consideration, any, and how many sewing machines; and whether or not the same embraced the said improvement in sewing machines, or any substantial part thereof, patented to your orator as aforesaid, or how the same differed from your orator's said patent, if at all.

And that the said defendant may answer the premises, and may be decreed to account for and pay over to your orator all gains and profits realized from his unlawful making, using, or vending of sewing machines, embracing said improvement patented to and vested in your orator as aforesaid; and may be restrained by an injunction to be issued out of this honorable court, or by one of your honors, according to law in such case provided, from making, using, or vending any sewing machines embracing said improvement, or any substantial part thereof, patented to your orator as aforesaid, and that the infringing machines now in possession or under the control of the defendant may be delivered up to your orator or be destroyed; and for such further and other relief in the premises as the nature of the case may require, and to your honors may seem meet. May it please your honors, etc.

E. H., JR.

J. G. for Plaintiff.

## XXVII. BILLS OF REVIVOR.

1. *Bills of revivor (before decree) by the administrator of the plaintiff in the original suit, the executors in his will having renounced probate.<sup>1</sup>*

[Title and address.]

Humbly complaining, sheweth unto your honors the plaintiff

<sup>1</sup> A suit abated by the death of a defendant can only proceed by bill of revivor against his representatives. *Miles v. Miles*, 64 Am. Dec. 362.

By the Judiciary Act of September 24, 1789, section 21 (now Rev. Stats. §§ 925, 956), and the provisions auxiliary to it, Congress treats

C. D., of, etc., that J. A., late of, etc., but now deceased, on or about ———, exhibited his original bill of complaint in this honorable court against G. T. W., of, etc., as the defendant thereto, thereby stating, etc., praying, etc. [*Here state the prayer.*] And the plaintiff further sheweth unto your honors that the said defendant, having been duly served with process for that purpose, appeared and put in his answer to said bill, as in and by the said original bill, etc. And the plaintiff further sheweth, that some proceedings have been had before ———, one of the masters of this court, to whom this cause stands referred, but no general report has yet been made in the said cause; and that the said J. A. lately and on or about the ——— day of ———, departed this life, having first made and published his last will and testament in writing, bearing date the ——— day of ———, and a codicil thereto bearing date the ——— day of ———, and thereby appointed M. C. and W. W. executors thereof. And the plaintiff further sheweth, that the said M. C. and W. W. have renounced probate of the said will and codicil of the said J. A., deceased, and decline to act in the trusts thereof, and that the plaintiff has obtained letters of administration with the will annexed of the goods, chattels, rights, and credits of the said J. A., deceased, to be granted to him by and out of the proper court, and has thereby become and now is his legal personal representative. And the plaintiff further sheweth, that the said suit and proceedings have become abated by the death of the said J. A., and the plaintiff is, as he is advised, entitled to have the said suit and proceedings

the revivor of a suit by or against the representative of the deceased as a matter of right, and as a mere continuation of the original suit, without any distinction as to the citizenship of the representative, whether he belongs to the same State where the cause is pending or to another State. *Clarke v. Matthewson*, 12 Peters (U. S.) 164; reversing, 2 Sumn. (U. S.) 262. S. P., *Fitzpatrick v. Domingo*, 14 Fed. Rep. 216; 4 Woods, 163.

The abatement of a suit in equity is merely an interruption to a suit, suspending its progress until new parties are brought before the court. *Hoxie v. Carr*, 1 Sumn. (U. S.) 173.

2 Upon a bill of revivor the sole questions before the court are, the competency of the parties, and the correctness of the bill to revive. General objections to the original bill, grounded on its not showing a proper case for the interference of a court of equity, should be reserved until after the revivor of the bill. *Bettes v. Dana*, 2 Sumn. (U. S.) 383. Compare *Oliver v. Dacatur*, 4 Cranch C. C. 592; *Kennedy v. Bank of Georgia*, 8 How. (U. S.) 586.

revived against the said defendant G. T. W., and the said accounts by the aforesaid order of reference directed, prosecuted, and carried on, and to have the said cause put in the same plight and condition as the same was in previously to the abatement thereof by the death of said J. A.

To the end, therefore, that the said defendant may answer the premises; and that the said suit and proceedings which so became abated as aforesaid may stand revived, and be in the same state and condition as the same were in at the time of the death of the said J. A., or that the defendant may show good cause to the contrary. May it please your honors to grant unto the plaintiff a writ of *subpœna* to revive [and answer], issuing out of and under the seal of this honorable court to be directed to the said G. T. W., thereby commanding him at a certain day and under a certain penalty, to be therein limited, personally to be and appear before your honors, in this honorable court, then and there [to answer the premises and] to show cause, if he can, why the said suit, and the proceedings therein had, should not stand and be revived against him, and be in the same plight and condition as the same were in at the time of the abatement thereof: and further to stand to, and to abide, such order and decree in the premises as to your honors shall seem meet. And the plaintiff shall ever pray, etc. [*Where it is only necessary to pray a subpœna to revive, the words within brackets should be omitted.*]

## 2. *Bill of revivor on the marriage of a female plaintiff.*

[*Title and address.*]

Humbly complaining, show unto your honors the plaintiffs A. B., of, etc., and E. B., his wife, that on or about ———, the said E. B., by her then name of E. M., exhibited her original bill of complaint in this honorable court against ——— and W. M., as defendants thereto, thereby stating, etc., and praying, etc. [*State the prayer of the bill.*] And the plaintiffs further show that the said several defendants being duly served with process, severally appeared and put in their answers to the said original bill; as in and by, etc. And the plaintiffs further show that the said E. B. took several exceptions to the answer put in

by the said defendant W. M. to the said original bill, and which said exceptions were, upon argument, allowed by the master, to whom the same were referred. And the plaintiffs further show that said E. B. afterwards obtained an order of this honorable court to amend her said original bill, and that the said defendant W. M. might answer the said amendments at the same time that he answered the said exceptions. And the plaintiffs further show that before the said W. M. had put in his answer to the said exceptions, or any further proceedings were had in the said suit, and on or about the —— day of ——, the said E. B. intermarried with said A. B., whereby the said suit and proceedings became abated. And the plaintiffs are advised that they are entitled to have the same revived, and to be put in the same plight and condition as the same were in at the time of the abatement thereof. To the end, therefore, that the said suit and proceedings, which so became abated as aforesaid, may stand revived, and be in the same plight and condition as the same were in at the time of such abatement, or that the said defendants may show good cause to the contrary. May it please your honors to grant unto the plaintiffs a writ of *subpœna* to revive, issuing out of, and under the seal of this honorable court, to be directed to the said W. M., thereby commanding him, at a certain day, and under a certain penalty to be therein inserted, personally to be and appear before your honors in this honorable court, then and there to answer and show cause, if he can, why the said suit and the proceedings therein had shall not stand and be revived against him, and be in the same plight and condition as the same were in at the time of the abatement thereof, and further to stand to and abide such order and decree in the premises as to your honors shall seem meet.

And the plaintiffs will ever pray, etc.

3. *Bill of revivor and supplement by executors of deceased plaintiff in original bill, against administratrix, heiress at law of deceased defendant, against whom the original had been exhibited for foreclosure of a mortgage of freehold and leasehold property.*

[Title and address.]

Humbly complaining, show unto your honors your orators

R. W., of, etc., and N. W., of, etc., executors named and appointed in and by the last will and testament of H. W., late of, etc., gent., deceased, that on or about the —— day of July, ——, the said H. W. exhibited his bill of complaint in this honorable court against T. W., late of, etc., gent., deceased, thereby praying that the said T. W. might be decreed by this honorable court to come to a just and fair account with the said H. W. for the principal and interest then due and owing to him on the mortgage security in the said bill mentioned, and might pay the same to the said H. W. by a short day to be appointed by this honorable court, together with his costs; and in default thereof, that the said T. W. might stand absolutely barred and foreclosed of and from all manner of benefit and advantage of redemption or claim in or to the residue of the respective mortgaged premises in the said bill mentioned, and every part thereof. And the said defendant T. W., having been duly served with process, appeared thereto, and departed this life on or about the twenty-third day of January, ——, without having put in his answer to the said bill. And your orators show unto your honors by way of supplement to the said original bill, that the said defendant T. W. departed this life intestate, leaving his wife E. W., a defendant hereinafter named, *enciente* with a child since born and named A. W., and the said A. W. is now the sole heiress at law of the said T. W., deceased, and as such entitled to the equity of redemption of the said mortgaged premises. And your orators further show unto your honors, that on or about the twelfth day of August, ——, letters of administration of the goods, chattels, and effects of the said T. W., deceased, were duly granted by the court of —— unto his widow, the said E. W., who is thereby become his sole personal representative. And your orators further show unto your honors that the said complainant H. W. departed this life on or about the first day of February, ——, having previously duly made and published his last will and testament in writing, bearing date on or about the thirteenth day of May, ——, and thereof appointed your orators joint executors; and on or about the fifth day of July, ——, your orators duly proved the said will in the said court of ——,

and took upon themselves the burthen of the execution thereof. And your orators further show that upon the death of the said H. W. the said mortgaged premises became, and the same are now vested absolutely at law in your orators, as his legal personal representatives, subject nevertheless to redemption, on payment of the principal money and interest thereby secured. And your orators further show unto your honors that the said suit having become abated by the death of the said T. W., your orators are advised that they, as the personal representatives of the said H. W., deceased, are entitled to have the same revived and restored as against the said E. W. and A. W. to the same plight and condition in which it was at the time of the death of the said T. W., and to have the same relief against the said E. W. and A. W. To the end, therefore, that the said E. W. and A. W. may upon their respective corporal oaths, etc. [*Interrogate to the statements.*]

And that the said E. W. and A. W. may answer the said original bill, and that they may be decreed by this honorable court to come to a just and fair account with your orators for the principal and interest now due and owing to your orators on the said mortgage securities, and may pay the same to your orators by a short day to be appointed by this honorable court, together with your orators' costs, and in default thereof, that the said defendants may stand and may be absolutely barred and foreclosed of and from all manner of benefit or advantage of redemption or claim in or to the said mortgaged premises, and every part thereof; and that the said suit may stand and be revived against the said defendants, and be in the same plight and condition in which the same was at the time of the decease of the said defendant T. W., or that the said E. W. and A. W. respectively may show good cause to the contrary. May it please, etc.



XXVIII. BILLS OF REVIEW.<sup>1</sup>1. *Bill of review to examine and reverse a decree signed and enrolled*[*Title and address.*]

Humbly complaining, sheweth unto your honors your orator A. B., of C., in the county of D., Esq., that in ——— term, in the year ———, W. S., of, etc. (the defendant hereinafter named), exhibited his bill of complaint in this honorable court against your orator, and thereby set forth that, etc. [*Here insert the original bill.*] And your orator being served with a *subpoena* for that purpose, appeared and put in his answer to the said bill, to the effect following: [*Here recite the substance of the answer.*] And the said W. S. replied to the said answer, and issue having been joined, and witnesses examined, and publication duly passed, the said cause was set down to be heard, and was heard before your honors, the ——— day of ——— last, when a decree was pronounced, which was afterwards passed and entered, in which it was set forth and recited, that it was at the hearing, on your orator's behalf, insisted, that your orator had, by his answer, set forth that, etc. [*Here insert the recital and decree.*] And the said decree has since, and on or about ———, been duly signed and enrolled, and which said decree your orator humbly insists is erroneous, and ought to be reviewed, reversed, and set aside for many apparent errors and imperfections, inasmuch as it appears by your orator's answer, set forth in the body of the said decree. [*Here insert the apparent errors.*] And no proof being made thereof, no decree ought to have been made or grounded thereon; but the said bill ought to have been dismissed for the reasons aforesaid. In consideration whereof, and inasmuch as such errors and imperfections appear in the body of the said decree, and there is no proof on which to ground any decree to set aside the said rent-charge, your orator hopes that the said decree will be reversed and set aside, and no further

<sup>1</sup> To authorize a bill of review, under either the English or American practice, error must appear on the face of the decree or pleadings, and the evidence at large cannot be gone into. *Seguin v. Maverick*, 76 Am. Dec. 117. And leave of the court must be obtained before filing the bill. *Simpson v. Watts*, 62 Am. Dec. 392.

proceedings had thereon. To the end, therefore, that the said W. S., etc. And that for the reasons, and under the circumstances aforesaid, the said decree may be reviewed, reversed, and set aside, and no further proceedings taken thereon, and your orator permitted to remain in the undisturbed possession and enjoyment of the said rent-charge. May it please, etc.

2. *Bill of review on discovery of new matter.*

[*Title and address.*]

Humbly complaining, sheweth unto your honors the plaintiff A. B., of, etc., that on or about ———, C. D., of, etc., the defendant hereinafter named, exhibited his bill of complaint in this honorable court against the plaintiff, and thereby set forth that, etc. [*Here insert the original bill.*] And the plaintiff being duly served with process for that purpose, appeared and put in his answer to the said bill, to the effect following: [*Here state the substance of the answer.*] And the said C. D. replied to the said answer, and issue having been joined and witnesses examined, and the proofs closed [*or, the said C. D. joined issue on the answer, and*], the said cause was set down to be heard, and was heard before your honors, on the ——— day of ———, when a decree was pronounced, whereby your honors decreed that the plaintiff's title to the premises was valid and effectual, after which the said C. D. petitioned your honors for a rehearing, and the said cause was accordingly reheard, and a decree of reversal made by your honors on the ground of the said C. D. being the heir at law of the said E. F., deceased, and which said decree of reversal was afterwards duly signed and enrolled, as by the said decree and other proceedings now remaining filed as of record in this honorable court, reference being thereto had, will appear. And the plaintiff sheweth unto your honors, by leave of this honorable court first had and obtained for that purpose, by way of supplement, that since the signing of the said decree of reversal, the plaintiff has discovered, as the fact is, that the said E. F. was, in his lifetime, seised in his demesne as of fee, of and in the hereditaments and premises in question in the said cause, and that the said E. F., while so seised, and when of sound mind, duly made and published his last will and

testament in writing, bearing date on the ——— day of ———, which was executed by him, and attested according to law, and thereby gave and devised unto the said J. W., his heirs and assigns forever, to and for his and their own absolute use and benefit, the said hereditaments and premises in question in the said cause (to which the plaintiff claims to be entitled as purchaser thereof from the said J. W.). And the plaintiff further sheweth unto your honors that since the said decree of reversal was so made, signed, and enrolled, as aforesaid, and on or about ———, the said C. D. departed this life intestate, leaving G. H., of, etc. (the defendant hereinafter named), his heir at law, who, as such, claims to be entitled to the said hereditaments and premises, in exclusion of the plaintiff. And the plaintiff is advised and insists that, under the aforesaid circumstances, the said last-mentioned decree, in consequence of the discovery of such new matter as aforesaid, ought to be reviewed and reversed; and that the first decree declaring the plaintiff entitled to the said hereditaments and premises should stand, and be established and confirmed; and for effectuating the same, the said several proceedings, which became abated by the death of the said C. D. should stand and be revived against the said G. H., as his heir at law.

*To the end, therefore, etc.* And that the said suit may be revived against the said G. H., or that he may show good cause to the contrary, and that the said last decree, and all proceedings thereon, may be reviewed and reversed, and that the said first-mentioned decree may stand and be established and confirmed, and be added to, by the said will being declared a good and effectual devise of such hereditaments and premises as aforesaid; and that the said G. H. may be decreed to put the plaintiff into possession of the said hereditaments and premises, and in the same situation, in every respect, as far as circumstances will now permit, as the plaintiff would have been in case such last decree had never been pronounced and executed; and that the plaintiff may have such other, etc. May it please, etc.

*[Pray subpoena to revive and answer against the said G. H.]*

## XXIX. BILL TO SUSPEND A DECREE.

1. *Bill to enlarge time of performance of decree, on ground of inevitable necessity, which prevented party from complying with the strict terms of it.*

[Title and address.]

Humbly complaining, sheweth unto your honors your orator A. B., of, etc. That your orator, in the year ———, borrowed the sum of \$——— from C. D., of, etc. (the defendant hereinafter named), and in order to secure to the said C. D. the repayment thereof, with legal interest, your orator, by an indenture bearing date the ——— day of ———, in the year ———, granted, bargained, sold, and demised unto the said C. D., his executors, administrators, and assigns, all that the manor of K., etc., with the appurtenances, for the term of one thousand years, subject to redemption on payment by your orator of the said sum of \$——— and interest, as therein mentioned, as by the said indenture, reference being thereunto had, will more fully appear. And your orator further sheweth unto your honors that the said C. D., on or about ———, exhibited his bill of complaint in this honorable court against your orator, for payment of what was then due to him for principal and interest on the said security, by a short day to be appointed for that purpose, or that your orator might be absolutely debarred and foreclosed from all right and equity of redemption in the said mortgaged premises; and your orator having put in his answer thereto, and submitted to pay what should appear to be due from him, the said cause came on to be heard before your honors on or about ———, when it was referred to R. V., one of the masters of this honorable court, to take an account of what was so due from your orator to the said C. D. as aforesaid, and your orator was ordered to pay the same on the ——— day of ———, or to be absolutely foreclosed of all right and equity of redemption in the said mortgaged premises; as by the said proceedings now remaining as of record in this honorable court, reference being thereunto had, will appear. And your orator further sheweth unto your honors, that your orator was duly prepared to pay what should

be reported to be due from him; but before the said master made his report, your orator was sent in great haste, by the commands of his majesty, ambassador to the court of Paris on special and weighty affairs of State, which admitted of no delay; and your orator was therefore unable to make any provision for the payment of what should be so found due from him as aforesaid. And your orator further sheweth unto your honors, that the said master, during your orator's absence, made his report, whereby he found that the sum of \$—— was due to the said C. D. for principal and interest from your orator, but no further proceedings have since been taken in the said cause. And your orator being ready and willing to pay the said sum of \$—— to the said C. D., and all subsequent interest thereon, is advised, that on payment thereof, he is entitled under the circumstances aforesaid to have so much of the said decree as relates to the foreclosure of your orator's right and equity of redemption in the said mortgaged premises suspended, and on payment thereof, to have a reconveyance of the said mortgaged premises from the said C. D. for the remainder of the term so granted to him as aforesaid. To the end therefore, etc. [*Interrogate to the foregoing statement, and particularly the cause alleged for suspension of the decree.*] And that the subsequent interest on the said sum of \$——, so reported to be due from your orator as aforesaid to the present time, may be computed by the direction of this honorable court, and that on payment of the said sum of \$—— and such interest as aforesaid, the said decree of foreclosure may be suspended, and the said C. D. directed, at the expense of your orator, to reconvey the said mortgaged premises to your orator, or as he shall appoint, freed and absolutely discharged from the said mortgage. [*And for general relief.*] May it please, etc. [*End by praying subpoena against C. D.*]

### XXX. BILL TO SET ASIDE A DECREE OBTAINED BY FRAUD.<sup>1</sup>

#### 1. *Bill to set aside a decree of foreclosure fraudulently obtained, and for a redemption.*

[*Title and address.*]

Humbly complaining, sheweth unto your honors the plaintiff A. B., of, etc., that T. B., of, etc., deceased, the plaintiff's late father, during his life, and on or about the —— day of ——, was seised in his demesne, as of fee, of and in the real estate hereinafter particularly described; and by indenture of that date, made between the said T. B. of the one part, and C. D., of, etc., the defendant hereinafter named, of the other part, the said T. B., in consideration of \$——, bargained, sold, and conveyed unto the said C. D., his heirs and assigns, all, etc. [*describe the mortgaged premises*], subject to redemption on payment of the said principal money and lawful interest at the time therein mentioned, and long since past; as by the said indenture, reference being thereto had, will more fully appear. And the plaintiff further sheweth that the said T. B. departed this life on or about ——, leaving the plaintiff his heir at law, and only child, then an infant under twenty-one years of age, that is to say, of the age of seven years or thereabouts, him surviving. And the plaintiff further sheweth that during the plaintiff's minority, on or about ——, the said C. D. filed his bill of complaint in this honorable court against the plaintiff for a foreclosure of the plaintiff's right and equity of redemption in the said mortgaged premises; but the plaintiff was not represented in such bill to be then an infant; and the said C. D. caused and procured one L. M., since deceased, who acted in the management of the affairs of the plaintiff's said father, to put in an answer in the name of the plaintiff, and without ever acquainting the plaintiff, or any of his friends or

<sup>1</sup> A bill for this purpose must set out distinctly the particulars of the fraud, the names of the parties who were engaged in it, and the manner in which the court or the party injured was misled or imposed on. *United States v. Atherton*, 102 U. S. 372.

A bill alleging that the decree was obtained *either* by mistake, *or* by deception, *or* by collusion, etc., is demurrable as too indefinite. *Brooks v. O'Hara*, 8 Fed. Rep. 529; 2 McCrary, 644.

relations therewith; in which said answer a much greater sum was stated to be due from the plaintiff, on the said mortgage security, to the said C. D., than in fact was really owing to him, and for which it was untruly stated that the said mortgaged premises were an insufficient security; and in consequence of such answer being put in, the said C. D. afterwards, in conjunction with the said L. M., on or about ———, obtained an absolute decree of foreclosure against the plaintiff, which the plaintiff has only lately discovered, and of which the plaintiff had no notice, and in which said decree no day is given to the plaintiff, who was an infant when the same was pronounced, to show cause against it when he came of age; as by the said proceedings now remaining as of record in this honorable court, reference thereto being had, will more fully appear. And the plaintiff further shows that the plaintiff, on the ——— day of ——— last, attained the age of twenty-one years, and shortly afterwards, having discovered that such transactions had taken place during his minority as aforesaid, by himself and his agents, represented the same to the said C. D., and requested him to deliver up possession of the said mortgaged premises to the plaintiff, on being paid the principal money and interest, if any, actually and fairly due thereon, which the plaintiff offered, and has at all times been ready to pay, and which would have been paid by the personal representatives of the said T. B. out of his personal assets, during the plaintiff's minority, had any application been made for that purpose. And the plaintiff hoped that the said C. D. would not have insisted on the said decree of foreclosure, so fraudulently obtained as aforesaid, but would have permitted the plaintiff to redeem the said mortgaged premises, as he ought to have done. *But now so it is, etc.*, the said C. D., etc., pretends that the said decree of foreclosure was fairly and properly obtained, and that a day was therein given to the plaintiff, when of age, to show cause against the same, and that the plaintiff has neglected to do so, and that the plaintiff is neither entitled to redeem, nor to travel into the said accounts; whereas the plaintiff charges the contrary thereof to be true, and that the plaintiff only attained the age of twenty-

one years on the said ——— day of ———, and that he has since discovered the several matters aforesaid, by searching in the proper offices of this honorable court; and the plaintiff expressly charges that, under the circumstances aforesaid, the said decree, so fraudulently obtained, as hereinbefore mentioned, ought to be set aside, and the plaintiff ought not to be precluded thereby, or in any other manner, from redeeming the said mortgaged premises, of which the said C. D. has possessed himself, by such means as aforesaid. All which actings, etc. In consideration whereof, etc. To the end, etc.; and that the said decree of foreclosure may, for the reasons and under the circumstances aforesaid, be set aside by this honorable court, and declared to be fraudulent and void; and that an account may be taken of what, if anything, is now due to the said C. D. for principal and interest on the said mortgage; and that an account may also be taken of the rents and profits of the said mortgaged premises, which have, or without his wilful default might have been, received by or on behalf of the said C. D., and if the same shall appear to have been more than the principal and interest due on the said mortgage, then that the residue thereof may be paid over to the plaintiff, and that the plaintiff may be at liberty to redeem the said mortgaged premises, on payment of the principal and interest, if any, remaining due on the said security; and that the said C. D. may be decreed, on being paid such principal money and interest, to deliver up possession of the said mortgaged premises, free from all encumbrances, to the plaintiff, or as he shall appoint, and to deliver up all title deeds and writings relating thereto. [*General relief.*] May it please, etc. [*Prayer for subpoena against C. D., etc.*]

### XXXI. BILL TO CARRY A DECREE INTO EXECUTION.<sup>1</sup>

1. *Where a decree of partition has been obtained and not executed.*

[*Title and address.*]

Humbly complaining, sheweth unto your honors the plaintiff

<sup>1</sup> A bill will lie to execute a decree where, owing to the neglect of the parties to proceed under it, their rights have become embar-



A. B., of, etc., that the plaintiff, on or about the —— day of ——, filed his bill of complaint in this honorable court against E. B., stating [*set out substance of a bill for partition*] and praying [*set out prayer verbatim*]. And the plaintiff further sheweth, that due process having been served upon the said E. B., he appeared and put in his answer to said bill, to which answer a replication was filed [*or, on which answer issue was joined*]. And the said cause being duly at issue, the same came on to be heard, and was heard, before your honors on the —— day of ——, when your honors were pleased to order and decree that a commission should issue to certain commissioners to be therein named, to make partition of the estate in question, who were to take the depositions of witnesses to be examined by them, in writing, and return the same with the said commission; and that the said estate was to be divided and separated, and one-third part thereof set out in severalty and declared to belong to the said E. B. and his heirs; and the remaining two thirds thereof declared to belong absolutely to the plaintiff, to be held in severalty by him; and the respective parties were decreed to convey their several shares to each other, to hold in severalty according to their respective undivided shares thereof; and that it should be referred to H. R., one of the masters of this court, to settle the conveyances, in case the parties differed about the same, as by the said proceedings and decree now remaining as of record in this honorable court, reference being thereunto had, will more fully appear. And the plaintiff further sheweth unto your honors, that the commission awarded by the said decree never issued, on account of the said E. B. going abroad, and being, until lately, out of the jurisdiction of this honorable court; but the said E. B. having since returned, and the inconvenience mentioned in the plaintiff's former bill [*for partition*] still subsisting, the plaintiff is desirous of having the said decree forthwith carried into execution, but from the great length of time which has elapsed, and the refusal of the said E. B. to concur therein, the plaintiff is advised the same cannot be done without the assented by subsequent events, and a new decree is necessary to ascertain them, and where the decree is not unjust nor inequitable. Wright v. Bowden, 59 Am. Dec. 600.

sistance of this honorable court. *To the end*, therefore, etc. And that the said decree may be directed to be forthwith carried specifically into execution, and the said E. B. ordered to do and concur in all necessary acts for that purpose. May it please, etc. [*Prayer for subpoena against E. B.*]

## CHAPTER V.

## INFORMATIONS.

**XXXII. 1.** *Information to restrain the making a carriage road and breaking up a public foot-path, in order to prevent certain streets from being made thoroughfares for carriages, contrary to the intention of a statute.*<sup>1</sup>

*[Title and address.]*

Informing, sheweth unto your honors, C. I. B., of, etc., Esq., attorney-general of the State [or commonwealth] of, etc., at and by the relation of A. B., etc., etc., against D. Y., etc., etc., that there is situate, lying, and being within the town of ———, a certain public street, called V Lane, leading from a certain other public street, called B Street, to a certain other public street, called G Street, and communicating on the north side thereof with certain other public streets, called C Street, Old B Street, and S Row. And the attorney-general aforesaid, by the relation aforesaid, further sheweth that at the east end of the said street, called V Lane, there is a certain other public street, called S Street, leading from thence into a certain other public street, called P Street, and that along the south side of said street, called V Lane, from S Street to B Street, there is, and for years past has been, a common and public foot-path, which has been from time to time paved with flag-stones at the expense of the inhabitants of the said town of ———, for the convenience of persons passing and repassing on foot, the said street, called V Lane, being a great public thoroughfare for foot passengers from B Street to S Street, although there is not nor ever has been any thoroughfare for carriages along the said street from B Street to S Street, by reason of certain wooden posts, which are, and ever since the making of the said street, called V Lane, have been placed across the said street a few feet

<sup>1</sup> Under the same general circumstances in which an action may be maintained by a stockholder against wrong-doing directors or officers, if the corporation is municipal or the trust is public or charitable, the attorney-general may sue, as a representative of the public beneficiaries, for appropriate relief. Pom. Eq. Jur. § 1096.

to the eastward of S Row. And the attorney-general aforesaid by the relation aforesaid sheweth that the said common and public footway from B Street to S Street is, and ever since the making of the same has been, bounded on the south for the most part by a certain ancient brick wall, which forms the northern fence and boundary of certain lands called M. Gardens and B. Gardens, and that there is not, nor ever has been, any public way or opening on the north side of the said footway, so that the people of the ——— in passing and repassing on the footway have at all times had the free and uninterrupted use thereof without any hurt, hindrance, or obstruction whatsoever. And the attorney-general aforesaid by the aforesaid relation further sheweth that upwards of ——— years since, the then owners of the said lands called M. Gardens and B. Gardens, severally claimed a right to open a public street or way from P through their respective lands into the said street, called V Lane, and threatened to make a public street or streets accordingly, but such claim being resisted on the part of the proprietors and inhabitants of the said several streets, called V Lane, C Street, Old B Street, and S Row, by reason of the disturbance and injury that would thereby be occasioned to the said several streets, the said owners of the said lands thought fit to abandon such claim, and afterwards, by an act of the ———, made and passed on the ——— day of ———, entitled, "An act," etc., it was provided, etc., which provision was inserted in the said act for the purpose of protecting the said streets, called V Lane, S Row, C Street, and Old B Street, from any thoroughfare for carriages from P to the said street called V Lane, by the way of S Street, or by any other means than by the way of B Street. And the attorney-general aforesaid by the relation aforesaid further sheweth that the said D. Y., proprietor of the said lands called M. Gardens, and the defendant hereinbefore named, has formed a plan for making, and is about to make a public street or way for horses, carts, and carriages, from P through the said lands called M. Gardens and the public street called V Lane, over the aforesaid common and public footway on the south side of the said street; and in and towards the execution of such plan has actually made an opening in the said ancient boundary

wall, and has taken up a part of the flag pavement of the said footway. And the said attorney-general at the aforesaid relation further sheweth that such public street or way so intended to be made by the said defendant D. Y., if carried into execution, will greatly interrupt and obstruct the said common and public footway on the south side of the said street called V Lane, and will be to the great damage and common nuisance of all the people of ———, passing and repassing by the said footway. And the attorney-general aforesaid at the relation aforesaid further sheweth that such intended street, if carried into execution, will be opposite to the end of S Row, and westward of the said wooden posts, so as aforesaid placed across the said street called V Lane, and by making a direct thoroughfare for horses, carts, and carriages from P into the said street called V Lane, will actually defeat the provision made as aforesaid in the said act for the protection of the said streets called V Lane, S Row, C Street, and Old B Street, from any thoroughfare for carriages, and will therefore be contrary to the true intent, meaning, and spirit of the said act. *To the end*, therefore, that the said D. Y. may, according to the best of his knowledge, remembrance, information, and belief, etc.

And that the said defendant may answer the premises; and that the said defendant, his agents, servants, and workmen, may be restrained by the order and injunction of this honorable court from proceeding to make and open any public street or way from the said lands called M. Gardens into the said street called V Lane, over the said common and public footway; and that the said defendant may be directed to replace the flagstones of the said footway so as aforesaid removed by him or by his order, and to put the same footway into the same state and condition as the same was in before his obstruction aforesaid. [*And for further relief.*]

J. L.

**XXXIII. 2.** *Information at the relation of certain freeholders and inhabitants of a parish, forming a society called "The Twenty-Four," by whom the affairs of the parish were managed, to establish a bequest of stock for the benefit of the poor of a certain district within the same parish, praying also to have the stock transferred into the ——— name of ———.*<sup>1</sup>

[Title and address.]

Informing, sheweth your honors, C. I. R., of, etc., Esq., attorney-general of the State [or commonwealth] of, etc., at and by the relation of E. C. R., W. G., etc., etc., all housekeepers and inhabitants, having freehold estates within the parish of T., in the county of N., that there has been from time immemorial within the said parish a certain society consisting of twenty-four persons, being housekeepers and inhabitants, and having freehold estates within the said parish, and which said society has always been, and still is, called or known by the name or description of "The Twenty-Four"; twelve of which twenty-four have from time immemorial been elected or chosen out of the principal inhabitants having freehold estates within the township or district of N. S., within the said parish, and the remaining twelve out of the principal inhabitants having freehold estates within the rest of the said parish, commonly called the country part of the said parish, the said twenty-four persons having constantly had the direction and management of the business and concerns of the said parish. And the attorney-general aforesaid, at the relation aforesaid, also informeth your honors, that, upon the death of any one or more of the said society, or in case of his or their selling or disposing of his or their freehold or freeholds within the said parish, the survivors and others of the said society have been from time to time, whereof the memory of man is not to the contrary, used and accustomed to elect and choose, and have accordingly elected and chosen, on the ——— day of ——— following such event, some other person or persons to be a member or members of the said society in the room or stead of the person or persons so dying or disposing of his or their freehold as afore-

1 From Dan. Ch. Pr. \*2078.

said. And the attorney-general aforesaid, at the relation aforesaid, further informeth your honors, that the relators and H. H., late of W., in the county of N., Esq., were the persons who were last elected or chosen as members which composed the said society; and the said H. H. having lately departed this life, your relators are the surviving and present members of the said society. And the attorney-general aforesaid, at the relation aforesaid, further informeth your honors that M. R., late of, etc., widow, deceased, in her lifetime duly made and published her last will and testament in writing, bearing date on or about the —— day of ——, and thereby, amongst other things, appointing R. J. and P. P., of, etc., Esqs., executors, thereof. She gave and bequeathed unto her said executors in the words and figures, or to the purport and effect following, that is to say: "I give, devise, and bequeath unto the said P. P. and R. J., and the survivor of them, and the executors and administrators of such survivor, the sum of \$——, East India annuities, part of which is now standing in my name in the banks of that company, in trust, that they, my said trustees and the survivor of them, and the executors and administrators of such survivor, do and shall pay to, authorize, and permit and suffer the housekeepers and inhabitants of the township of N. S., commonly called 'The Twenty-Four,' for the time being forever, to receive the dividends, produce, and interest of the said sum of \$——, East India annuities, as and when the same shall become due and payable, in trust, to be by them, or any five or more of them, paid, applied, and disposed of from time to time forever, unto and amongst such of the poor of the said township as they shall think proper;" as in and by such will and the probate thereof, relation being thereunto had, will more fully appear. And the attorney-general aforesaid, at the relation aforesaid, further informeth your honors, that the said testatrix M. R. departed this life on or about the —— day of ——, without revoking or altering her said will, and upon or soon after her death the said P. P. and R. J. duly proved the said will in the appropriate court, and undertook the executorship thereof. And the attorney-general aforesaid, at the relation aforesaid, further informeth your honors that

the said testatrix M. R. was at the time of her death possessed of or entitled unto a considerable personal estate, consisting of many valuable particulars, and particularly she was possessed of or entitled unto a considerable sum of money in East India annuities to a much larger amount than the said legacy; and upon or shortly after her decease, the said P. P. and R. J., by virtue of the said will and the probate thereof, possessed themselves of all the said personal estate and effects, and procured the said East India annuities to be transferred into their names. And the attorney-general aforesaid, at the relation aforesaid, further informeth your honors that the personal estate and effects late of or belonging to the said testatrix, and possessed by her said executors since her decease, were more than sufficient (exclusive of the said East India annuities) for the payment of all her debts, funeral expenses, and legacies, all which debts, funeral expenses, and legacies, save the aforesaid charitable legacy, have been long since fully paid and discharged; and the said East India annuities now remain standing in the names of the said P. P. and R. J., to answer and satisfy the aforesaid legacy. And the attorney-general aforesaid, at the relation aforesaid, further informeth your honors that your relators being the persons meant and intended in the said testatrix's will mentioned, of the housekeepers and inhabitants of the township of N. S., commonly called "The Twenty-Four," hoped that the said P. P. and R. J. would have paid and applied the interest or dividends of the said East India annuities for the benefit of such person or persons as are entitled thereto by virtue of the said testatrix's will. *But now so it is*, may it please your honors, the said P. P. and R. J. decline to pay the interest or dividends of the said sum of \$——, East India annuities, unto your relators, to be applied according to the direction of the said testatrix's will, alleging that they cannot do so with safety to themselves without the direction of this honorable court for their indemnity therein. And the attorney-general aforesaid charges that the charitable intentions of the said testatrix are in danger of being frustrated in process of time, when, after the deaths of the said defendants, it may be difficult to find out who are or who may be the per-



sonal representatives of the said testatrix, in order to obtain a representation to her, and the obtaining or procuring a representation to her will be attended with considerable expense, and therefore the said attorney-general and the said relators charge that the said sum of money in annuities aforesaid ought to be transferred into the name of the ——— of this honorable court upon the trusts and for the purposes aforesaid. *To the end*, therefore, that the said P. P. and R. J. may upon their several and respective corporal oaths, etc., etc.

And that the aforesaid charity may be established; and that the said P. P. and R. J. may be decreed to transfer the before-mentioned sum of \$—— in East India annuities into the name of the ——— of this honorable court, upon the trust and for the purpose mentioned and expressed in the said testatrix's said will concerning the same, and that the trust thereof may be declared accordingly; and that the interest or dividends which have become due thereon since the death of the said testatrix, and which may hereafter become due thereon, may from time to time forever hereafter be paid to the relators and their successors, the twenty-four of the housekeepers and inhabitants of the said township of N. S., to be applied in the manner by the said testatrix's will directed, and that such further and other directions may be given for the establishment and maintenance of the said charity as to your honors may seem meet and this case may require. May it please, etc.

## PART II — SUBSEQUENT PLEADINGS.

## CHAPTER VI.

## DEMURRERS.

## XXXIV. TITLE AND COMMENCEMENT.

1. *Form of title.*

The demurrer of A. B., attorney (or solicitor) general, or of C. D., Esq., attorney (or solicitor) general of the State of ———, or of the mayor and alderman of the city of E.; or of F. G., an infant under the age of twenty-one years, by H. I., his guardian, or of M. N. and O., his wife; or of P., the wife of R. S., who has fully obtained an order of this honorable court, for liberty to defend separately from her said husband, or of T., the wife of V. Y., defendants to the bill of complaint of Z. X., complainant.

*or,*

The demurrer of C. D., defendant, to the bill of complaint of A. B., the above-named plaintiff.

*or,*

The demurrer of John Jones (in the bill by mistake called William Jones), the above-named defendant [*or*, one of the above-named defendants], to the, etc.

*or,*

The joint and several demurrer of A. B. and C. D., the [*or*, two of the] above-named defendants, to the, etc.

*or,*

The joint demurrer of A. B. and C., his wife, the [*or*, two of the] above-named defendants, to the, etc. *Or, if they have married since she was made a defendant, say:* The joint demurrer of A. B. and C., his wife, lately and in the bill called C. D., spinster [*or*, widow], to the, etc.

2. *Introduction to a demurrer to the whole of the bill.*

This defendant (*or these defendants respectively*) by protesta-

tion, not confessing or acknowledging all, or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged,\* *doth (or do as the case may be)* demur thereto, and for cause of demurrer, *showeth (or show)*, that, etc.

8. *Where the demurrer is to part of the bill, or to the relief.*

(*As in the next preceding form to the asterisk*) as to so much and such part of the bill as seeks that this defendant (*or these defendants*) may answer and set forth whether, etc.; and whether, etc.; and prays, etc. (*if relief be prayed*); *doth (or do)* demur, and for cause of demurrer *showeth (or show)*.<sup>1</sup>

### XXXV. CONCLUSION.<sup>2</sup>

1. *General words of conclusion to a demurrer to the whole of the bill.*

Wherefore this defendant (*or these defendants respectively*), demands\* (*or demand*) the judgment of this honorable court, whether *he* shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays (*or pray*) to be hence dismissed, with his (*her, or their*), reasonable costs in this behalf sustained.

A. B., (*Counsel's name.*)

or,

Wherefore, and for divers other errors and imperfections, this defendant humbly demands, etc. (*As in the preceding form from the asterisk.*)

2. *Where the demurrer is to part only, or to the relief.*

Wherefore, and for divers other errors and imperfections appearing in the said bill, this defendant (*or these defendants*) humbly prays (*or pray*) the judgment † of this honorable court,

1 A special demurrer should point out, specifically, by paragraph, page, or folio, or other mode of reference, the parts of the bill to which it is intended to apply. *Atwill v. Ferrett*, 2 Blatchf. (U. S.) 32. S. P., Chicago, St. Louis, etc. *R. R. Co. v. Macomb*, 2 Fed. Rep. 18.

2 A demurrer to a bill in equity should be certified by counsel to be, in their opinion, well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay. *Secor v. Singleton*, 9 Fed. Rep. 809; 3 McCrary (U. S.) 230.

whether he (*she, or they*), shall be compelled to make any answer to such part of the said bill as is so demurred unto as aforesaid, etc.

*or*

And therefore, and for other good causes of demurrer in the said bill contained, as to so much of the said complainant's bill as is demurred unto as aforesaid, this defendant (*or these defendants*) doth (*or do*) demand the judgment, etc. (*As in the last form from †.*)

### XXXVI. VARIOUS FORMS OF DEMURRERS.<sup>1</sup>

#### 1. *General form of demurrer, plea, and answer.*

In Chancery.

Between, etc.

The demurrer, plea, and answer of A. B., the above-named defendant [*or, one of the above-named defendants*], to the bill of complaint [*or, amended bill of complaint*] of the above-named plaintiff.

(1) *Demurrer.* I, the defendant A. B., by protestation, not confessing or acknowledging all or any of the matters and things in the said bill contained to be true, in such manner and form as the same are therein set forth and alleged, as to so much of the said bill as seeks (state what), and also as to so much of the said bill as seeks, etc., do demur thereto.

And as to the discovery and relief sought by the said bill, save so much thereof as relates to the premises therein mentioned to be situate at S., in the county of D., for cause of demurrer I show that, etc.

And as to so much of the said discovery and relief as relates to the said premises at S. aforesaid, for cause of demurrer I show that, etc.

Wherefore and for divers other good causes of demurrer appearing in the said bill, I pray the judgment of this honorable

<sup>1</sup> Where a demurrer is interposed the bill is to be taken as true. *Taylor v. Bradshaw*, 17 Am. Dec. 132. A general demurrer admits all well pleaded allegations of a bill. *Smith v. Allen*, 21 Am. Dec. 33. A demurrer is, in a legal sense, an answer to the bill, though not an answer as that term is used in the common language of practice. *New Jersey v. New York*, 6 Peters (U. S.) 323.

court whether I shall be compelled to make any answer to such parts of the said bill as I have hereinbefore demurred to.

(2) *Plea.* And I, the defendant A. B., not waiving my said several demurrers, but wholly relying thereon, as to so much of the said bill as seeks, etc., and also as to so much of the said bill as seeks, etc., do plead thereto; and for plea say that, etc.; and I do aver that, etc.

All which last-mentioned matters and things I do plead in bar to so much of the said bill as is hereinbefore pleaded to; and I humbly pray judgment of this honorable court, whether I ought to make any further answer to so much of the said bill as is hereinbefore pleaded to.

(3) *Answer.* And I, the defendant A. B., not waiving my said several demurrers and plea, but wholly relying and insisting thereon, for answer to so much of the said bill as I am advised it is material or necessary for me to make answer unto, say as follows, etc. [Name of Counsel.]

2. *Demurrer for want of a suggestion that the evidence of the plaintiff's demand is not in his power.*

As to so much and such part of the said complainant's bill as prays relief, in respect of the bond bearing date —— for the sum of twenty thousand dollars in the said bill, stated to have been made and entered into, for the payment of ten thousand dollars and interest on the —— day of —— last by this defendant, or the money alleged, by the said bill, to be now due to the said complainant from this defendant thereon, this defendant doth demur, and for cause of demurrer sheweth, that the said bond appears by the said bill, to have been taken by the said complainant, in his own name, and to be now in the possession, custody, or power of the said complainant, who therefore has a remedy for his demand at law. Wherefore, etc.

3. *Demurrer to a bill for relief filed by a person beneficially entitled, where a right of action at law was in a trustee, suggesting a refusal by the trustee to suffer an action to be brought in his name.*

As to so much and such part of the said bill as seeks to com-

pel these defendants to pay the sum of five thousand dollars, or to make the said complainants satisfaction for any loss that has happened to the said ship, these defendants respectively demur; and for cause of demurrer show that if the policy of insurance in the said bill mentioned was forfeited, a proper action at law did and would lie to recover the money due thereon, and if the said complainants be entitled to any such relief as aforesaid, as prayed in and by their said bill, they might have a complete and adequate remedy by an action at law, where they ought and would be put to prove their interest in, and the loss of the said ship. Wherefore, etc.

#### 4. *Demurrer for want of parties.*<sup>1</sup>

That it appears by the said complainant's said bill that A. B., therein named, is a necessary party to the said bill, inasmuch as it is therein stated that C. D., the testator in the said bill named did in his lifetime, by certain conveyances made to the said A. B., in consideration of \$——, convey to him, by way of mortgage, certain estates in the said bill particularly mentioned and described, for the purpose of paying the said testator's debts and legacies; but the said complainant has not made the said A. B. a party to the said bill. Wherefore, etc.

#### 5. *Demurrer for multifariousness.*<sup>2</sup>

That it appears by the said bill that the same is exhibited by

1 A demurrer to a bill for want of the necessary parties must name the proper parties. *Dwight v. Central Vt. R. Co.* 9 Fed. Rep. 785; 20 Blatchf. (U. S.) 200.

2 There is no definite rule as to what constitutes multifariousness in a pleading in chancery. Each case must depend upon its own circumstances, and much must be left to the sound discretion of the court. *Gainey v. Chew*, 2 How. (U. S.) 619, 642; and note to Banks' ed. S. P., *Oliver v. Platt*, 3 How. (U. S.) 333, 411; affirming, 3 McLean (U. S.) 27; *McLean v. Lafayette Bank*, 3 McLean (U. S.) 415.

The objection of multifariousness cannot be insisted upon by the defendant as a matter of right at the hearing. It must be taken advantage of by the plea, answer, or demurrer. And although the court may take notice of it, at any time, *san sponte*, this will not be done at so late a period as the hearing, unless it is essential to the due administration of justice. An appellate court, *a fortiori*, would not entertain it, unless forced to do so by a moral necessity. *Oliver v. Platt*, 3 How. (U. S.) 333, 412; affirming, 3 McLean (U. S.) 27; *Nelson v. Hill*, 5 How. (U. S.) 127; and note to Banks' ed.

A bill is subject to demurrer for multifariousness, if one of the two complainants has no standing in court, or they set up antagonistic causes of action, or the relief for which they respectively pray

the said complainant against this defendant, and A. B., C. D., E. F., and G. H., as defendants thereto, for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is in no way interested; and, by reason of such distinct matters, the said bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof; and by joining distinct matters together, which do not depend on each other, the proceedings in the progress of the said suit will be intricate and prolix, and this defendant put to unnecessary charges and expenses in matters which in no way relate to, or concern him. Wherefore, etc.

*6. Demurrer to a bill brought for part of a matter only.*

That the said complainant, by his said bill, in order to split the cause, and create a multiplicity of suits, seeks only to recover a part of an entire debt, thereby stated to be due to him from this defendant; and in respect of other parts of the said debt has, as appears by his said bill, filed two several other bills of complaint in this honorable court against this defendant. Wherefore, etc.

*7. Demurrer to a bill of interpleader, because it does not show any claim of right in the defendant.*

For that the said complainant has not in and by his said bill

in regard to a portion of the property sought to be reached involves totally distinct questions, requiring different evidence, and leading to different decrees. *Walker v. Powers*, 104 U. S. 245. But it is not multifarious simply because it prays for different modes of relief against one injury (*Wells v. Bridgeport etc. Co.* 79 Am. Dec. 250; *Way v. Bragaw*, 84 Am. Dec. 147); or where the joinder therein of two distinct matters prevents a needless multiplicity of suits, and neither inconveniences the defendants nor causes them additional expense (*Stafford Nat. Bank v. Sprague*, 8 Fed. Rep. 377; 19 Blatchf. [U. S.] 529); or where all the matters in controversy are between the same parties, arise out of the same transaction, from breaches of the same instrument, and can be settled in one suit. *Pacific R. R. Co. v. Atlantic & Pacific R. R. Co.* 20 Fed. Rep. 277.

So, also, a bill which embraces the distinct claims of several parties is not open to the objection of multifariousness, if the interests of all are so mingled in a series of complicated transactions that entire justice could not be conveniently obtained in separate and independent suits (*Oliver v. Platt*, 3 How. [U. S.] 333, 411; affirming, 3 McLean [U. S.] 27); as where it joins defendants holding distinct tracts of land under distinct conveyances, if the main ground of defense is common to all of the defendants. *Gaines v. Mauseaux*, 1 Woods, 118. See, also, *Shields v. Thomas*, 18 How. (U. S.) 263; *Turner v. American Baptist Missionary Union*, 5 McLean (U. S.) 344.

of interpleader shown any claim, or right, title, or interest whatsoever, in this defendant in or to the said estate called A., in the said bill particularly mentioned and described, in respect whereof this defendant ought to be compelled to interplead with C. D. in the said bill named, and the other defendant thereto. Wherefore, etc.

8. *Demurrer to a bill of interpleader, because the plaintiff shows no right to compel the defendants (whatsoever rights they may claim), to interplead.*

That the said complainant has not, in and by his said bill, shown any right and title whatsoever to compel this defendant, and A. B., the other said defendant to the said bill, to interplead. Wherefore, etc.

9. *Demurrer to a bill of interpleader, for want of the necessary affidavit.*

That although the said complainant's said bill is on the face thereof a bill of interpleader, and prays that this defendant and the other defendants thereto may interplead together concerning the matters therein mentioned, and may be restrained, by the order and injunction of this honorable court, from proceeding at law against the said complainant, touching such matters, yet the said complainant has not annexed an affidavit to his said bill, that he does not collude concerning such matters, or any of them, with this defendant and the other defendants thereto, or any or either of them, which affidavit ought, as this defendant is advised, according to the rules of this honorable court, to have been made by the said plaintiff, and annexed to the said bill. Wherefore, etc.

10. *Demurrer to a bill exhibited by an infant, where no next friend is named*

That the said complainant, who appears by the said bill to be an infant under the age of twenty-one years, hath exhibited his said bill without any person being therein named as his next friend. Wherefore, etc.



11. *Demurrer to a bill where the plaintiff claimed under a will, and it was apparent on the face of the bill that he had no title.*

That the said complainant hath not, as appears by his said bill, made out any title to the relief thereby prayed. Wherefore, etc.

12. *Demurrer on the ground of the statute of frauds.*

That it appears by the said bill that neither the promise or contract which is alleged by the said bill, and of which the plaintiff by the said bill seeks to have the benefit, nor any memorandum or note thereof, was ever reduced into writing or signed by this defendant [*or, these defendants or either (any) of them*], or any person authorized thereunto, within the meaning of the statute passed in the twenty-ninth year of King Charles the Second [*or, of chapter 105 of the General Statutes of Massachusetts*] for the prevention of frauds and perjuries.

## CHAPTER VII.

## PLEAS.

## XXXVII. FORMAL PARTS OF A PLEA.

1. *The title.*

The plea of ———, defendant (*or, defendants*), to the bill of complaint of ———, complainant.

2. *The commencement.*

This defendant (*or, these defendants respectively*) by protestation, not confessing or acknowledging all, or any of the matters and things in the said complainant's bill of complaint, mentioned and contained to be true, in such sort, manner, and form, as the same are therein set forth and alleged,\* for plea to the *whole of the said bill*, or, to *so much and such part of the said bill as prays, etc.*, or, *seeks a discovery from this defendant* (*or, these defendants. Whether, etc.*).

3. *The conclusion.*

All which matters and things this defendant doth aver [*or, these defendants do aver*] to be true, and he pleads [*or, they plead*] the said [*statute or release, etc., as the case may be (in bar)*] to the said plaintiff's bill [*or, if the plea extend to part only, to so much of the said bill as hereinbefore particularly mentioned*], and prays [*or, pray*] the judgment of this honorable court, whether he [*or, they*] should be compelled [*or, ought to be required*] to make any other or further answer to the said bill [*or, to so much of the said bill as is hereinbefore pleaded to*], and prays [*or, pray*] to be hence dismissed with his [*or, their*] costs and charges in that behalf, most wrongfully sustained.

[*Counsel's signature.*]

## XXXVIII. PLEAS TO THE PERSON.

1. *Plea that the plaintiff is an alien enemy.*<sup>1</sup>

[Title and commencement.]

That the said complainant A. B. is an alien, born of foreign parents, and in foreign parts, that is to say, at Calais, in the kingdom of France, and out of the allegiance of our lord the king, and under the allegiance of the said king of France, who is an enemy to our said lord the king, and to whom the parents of the said complainant adhere; and the said complainant also before, and at the time of filing his said bill was, and now is, an enemy to our said lord the king, and entered into these dominions without the safe conduct of our said lord the king, and has not been made a subject of our said lord the king by naturalization, denization, or otherwise. Therefore, etc.

2. *Plea of infancy to a bill exhibited without a prochein ami.*

[Title and commencement.]

That the said plaintiff, before and at the time of filing his said bill in which he appears as the sole plaintiff, was, and now is, an infant under the age of twenty-one years; that is to say, of the age of ——— or thereabouts. Therefore, etc.

3. *Plea of coverture of the plaintiff.*

[Title and commencement.]

That the said plaintiff A. B., before and at the time of exhibiting her said bill, was, and now is, under coverture of one C. D., her husband, who is still living, and in every respect capable, if necessary, of instituting any suit at law or in equity in this ———, on her behalf. Therefore, etc.

1 Defenses in abatement of the suit, or going to the jurisdiction, being preliminary in their nature, must be taken advantage of by plea, and cannot be taken advantage of in a general answer, which necessarily admits the right and capacity of the party to sue. *Livingstone v. Story*, 11 Peters (U. S.) 351.

If, in a bill, the citizenship of the parties be properly averred, and the defendant means to deny the fact of citizenship, he must take the exception by way of plea. He cannot do it by a general answer, for it is a preliminary inquiry. *Dodge v. Perkins*, 4 Mason (U. S.) 435. *S. P.*, *Wood v. Mann*, 1 Sumn. (U. S.) 578; *The Isaac Newton*, Abb. Adm. 11.

#### 4. *Plea of lunacy.*

[*Title and commencement.*]

That the said plaintiff, who by himself alone attempts to sustain an injunction in this suit, before and at the time of filing his said bill, was duly found and declared to be a lunatic, under and by virtue of a commission of lunacy, duly awarded and issued against him, as by the inquisition thereon (a true copy whereof is now in this defendant's possession, and ready to be produced to this honorable court), to which this defendant craves leave to refer, will more fully appear; and which said commission has not hitherto been superseded, and still remains in full force and effect; and the said A. B. therein named and the said plaintiff is, as this defendant avers, one and the same person, and are not other and different persons. Therefore, etc.

#### 5. *Plea, that the supposed intestate is living, to a bill where the plaintiff entitled himself, as administrator.*

[*Title and commencement.*]

That A. B., in the said bill named (to whom the said complainant alleges that he has obtained letters of administration, and by virtue of which letters of administration, and also under the pretense of his being the heir at law of the said A. S., the said complainant has commenced and prosecuted this suit), was at the time the said complainant filed his said bill, and still is, alive at Paris, in the kingdom of France. Therefore this defendant demands the judgment of this honorable court, whether he shall be compelled to answer the said complainant's bill; and humbly prays to be dismissed with his reasonable costs in this behalf sustained.

#### 6. *Plea that the defendant never was administrator.*

[*Title and commencement.*]

That he is not, nor ever has been, administrator of the goods or estate which were of the said E. F., deceased, in the said bill named, as the said plaintiff in his said bill has untruly alleged. Therefore, etc.

XXXIX. PLEAS IN BAR, GENERALLY.<sup>1</sup>1. *Plea of former suit depending.*

[Title and commencement.]

That at a term of the ——— Court ———, which was held in the year ———, the said present plaintiff exhibited his bill of complaint in this honorable court against this defendant and one L. Y., for an account of the monies raised by the sale of the plantations and other estates in the said plaintiff's present bill mentioned, and claiming such shares and proportions thereof, and such rights and interests therein, as he now claims by his present bill; and praying relief against this defendant in the same manner, and for the same matters, and to the same effect as the said plaintiff now prays by his said present bill; and this defendant and the said L. Y. appeared and put in their answer to the said former bill, and the said plaintiff replied thereto, and witnesses were examined on both sides, and their depositions duly published, and the said former bill and the several proceedings in the said former cause, as this defendant avers, now remain depending, and as of record in this honorable court, the said cause being yet undetermined and undismissed; all which several matters and things this defendant doth aver, and pleads the said former bill, answer, and the several proceedings in the said former suit, in bar to the said plaintiff's present bill; and humbly demands the judgment of this honorable court, whether he shall be put to make any further or other answer thereto; and prays to be hence dismissed with his costs and charges in this behalf sustained.

XL. PLEAS IN BAR, OF MATTER IN PAIS.<sup>2</sup>1. *Plea of stated account.*

[Title and commencement.]

As to so much and such parts of the said plaintiff's bill as

1 It is a general rule that a plea ought not to contain more defenses than one. Various facts can never be pleaded in one plea unless they are all conducive to the single point on which the defendant means to rest his defense. *Rhode Island v. Massachusetts*, 14 Peters (U. S.) 210.

2 A plea of stated account obviously constitutes a bar to a suit in equity for an accounting, since in that case the remedy at law is en-

seeks an account of and concerning the dealings and transactions therein alleged to have taken place between the said plaintiff and this defendant at any time before the —— day of ——, in the year ——, this defendant for plea thereto saith, that on the —— day of ——, which was previously to the said bill of complaint being filed, the said plaintiff and this defendant did make up, state, and settle an account in *writing*, a counterpart whereof was then delivered to the said plaintiff, of all sums of money which this defendant had before that time, by the order and direction, and for the use of the said plaintiff received, and of all matters and things thereunto relating, or at any time before the said —— day of ——, being or depending between the said plaintiff and this defendant (and in respect whereof the said plaintiff's bill of complaint has been since filed), and the said plaintiff, after a strict examination of the said account, and every item and particular thereof, which this defendant avers according to his best knowledge and belief to be true and just, did approve and allow the same, and actually received from this defendant the sum of \$——, the balance of the said account, which by the said account appeared to be justly due to him from this defendant; and the said plaintiff thereupon, and on the —— day of ——, gave to this defendant a receipt, or acquittance for the same, under his hand, in full of all demands, and which said receipt or acquittance is in the words and figures following, that is to say (*here state the receipt verbatim*), as by the said receipt or acquittance, now in the possession of this defendant, and ready to be produced to this honorable court, will appear. Therefore, etc. (*Conclude as above.*)

## 2. *Plea of a will.*

[*Title and commencement.*]

As to so much and such part of the said complainant's bill as is entirely adequate; but of course a stated account may be opened for fraud and error. Pom. Eq. Jur. § 1421.

Parties who have long acquiesced in settlements of accounts or other mutual dealings are not permitted to re-open or disturb them; and this is true even though the parties stood in confidential relations towards each other, as trustee and *cestui que trust*, principal and agent, and the like, and the settlement embraced matters growing out of such relations. Pom. Eq. Jur. § 820.

seeks [*that a receiver may be forthwith appointed to receive the rents and profits of the real estates, late of James Thompson, deceased, in the said bill named, and now in the possession of this defendant*], and that this defendant may account with the said complainant for the rents and profits thereof, and that this defendant may be restrained by the order and injunction of this honorable court from felling, etc., timber, etc., growing thereon, or which seeks to set aside the will of the said J. Thompson, or which seeks any relief relative thereto; this defendant doth plead thereto, and for plea saith, that the said James Thompson being before and at the time of making his will, seised to him and his heirs, of and in divers manors, etc., in the several counties of, etc., of the yearly value of eleven hundred dollars or thereabouts, and being of sound mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the 10th of February, 1742, which was executed by him in the presence of, and attested by, John Overstow, John Hailes, and Richard Stacy, and thereby gave, etc. (*setting forth the will, under which the defendant had an estate for life in the testator's real estate, with remainder to the defendant's sons in tail male, and that the testator appointed the defendant executor of his said will*); and the said James Thompson, being so seised or entitled as aforesaid, died on the 28th of May last, without having altered or revoked his said will; and this defendant, soon after the death of the said testator, entered on the said real estates devised to him in manner aforesaid, and has ever since been in the enjoyment or receipt of the rents and profits thereof. Therefore, etc.

### 3. *Plea of an award.*<sup>1</sup>

[*Title and commencement.*]

That divers disputes, controversies, and differences having arisen, and being depending, between the said complainant and this defendant concerning an agreement for the purchase by this defendant, from the said complainant, of the lease, good-

<sup>1</sup> An award is treated as the continuance of the agreement to submit. If it directs acts to be done, which if stipulated for in a contract would render such contract capable of enforcement, then the award itself may be specifically enforced. Pom. Eq. Jur. § 1402.

will, and fixtures of a certain house and premises, used as a baker's shop, in Gray's Inn Lane, in the county of Middlesex; for the settling and adjusting such variances and controversies, the said complainant and this defendant, by two several bonds or writings obligatory, bearing date respectively the —— day of ——, became reciprocally bound to each other in the penal sum of \$——, to be paid to each other, with conditions to the said writings obligatory annexed to make void the same, if the said complainant and this defendant, their respective executors, administrators, and assigns, should obey and perform the award, arbitrament, judgment, final end, and determination of I. S., an arbitrator indifferently chosen between the said parties, concerning the said disputes, controversies, and differences, in respect of the said agreement for the purchase of the lease, good-will, and fixtures of the premises aforesaid, so as the said award, under the hand of the said arbitrator, should be made and set down in writing under his hand, ready to be delivered to the parties in difference on or before the —— day of —— then next, but now long since past; and the said I. S. having taken upon himself the burden of the said award, and having deliberately and at large heard, read, and duly and maturely weighed and considered all and singular the allegations, vouchers, proofs, and evidences, brought and produced before him, by and on the part and behalf of the said complainant and this defendant, touching the said matters in dispute and difference between them, and referred to him as aforesaid, did, within the time limited for that purpose by the said bonds, that is to say, on the —— day of ——, duly make his award in writing under his hand and seal, of and concerning the matters aforesaid (one part whereof was delivered to this defendant), and did thereby award and find that the aforesaid agreement between the defendant and the said complainant, relative to the aforesaid lease, good-will, and fixtures, was not binding upon them, and the said arbitrator did therefore declare the same void accordingly; and the said arbitrator did thereby award and declare, that the said complainant had no claim or demand whatsoever against this defendant, in respect or on account of the said agreement, as by the said award, reference being there-



unto had, will more fully appear; and this defendant avers, that the said award hath hitherto remained and still is unimpeached, and in full force and effect; and that the same was made previously to the said complainant's bill being filed in this honorable court, for the specific performance of the said agreement so declared void by the said award as aforesaid. Therefore, etc.

4. *Circumstances bringing a case within the protection of a statute; viz., the statute of limitations or the statute of frauds.*<sup>1</sup>

[*Title and commencement.*]

As to so much of the bill as seeks an account and discovery of the estate and effects of H. C., Esq., deceased, this defendant's testator, or that seeks a satisfaction for, or in respect of, any money received by the said H. C., for or on account of I. G., in the said bill named, or for or on account of the said plaintiff; or that seeks a discovery of how many hogsheads of tobacco or rice, or any other commodities pretended to have been consigned to the said H. C., or that seeks a satisfaction for the same; or that seeks a discovery or satisfaction for any of the money, goods, or effects of the said I. G., come to the hands of this defendant, since the decease of the said H. C.; this defendant pleads thereto, and for plea saith, that the said

1 In the earlier forms of the statute of limitations, the provisions were in express terms confined to actions at law; and yet courts of equity, proceeding upon the analogy of these enactments, in most suits to enforce equitable titles to real estate and equitable personal claims, applied the statutory periods. In certain kinds of suits, however, especially those brought against trustees to enforce express trusts, the analogy of the statute was not followed. The modern forms of these statutes, in the American States, generally declare in express terms that periods of limitation shall apply to all equitable suits as well as legal actions. Pom. Eq. Jur. § 419.

Courts of equity have also been in the habit of applying the statute of limitations as a bar, by analogy, in all ordinary cases, even though equitable suits were not expressly included within the statutory provisions. See *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Lansing v. Starr*, 2 Johns. Ch. 150.

There is no technical rule observed by the court of chancery as to the form of a plea of the statute of limitations. A plea which sets up an adverse possession of forty years, while the period required by the statutes of the State to bar a recovery is twenty years, is good; nor is it necessary to make any express reference to the statutes of the State. *Harpending v. Reformed Protestant Dutch Church*, 16 Peters (U. S.) 455.

I. G., under whom this defendant claims, departed this life in or about the year ———, and that the said H. C., this defendant's testator, afterwards also departed this life in the month of ———, in the year ———, and that the matters and effects pretended to have been received by the said H. C., or by this defendant, and the goods and commodities pretended to have been consigned (if any sums of money, goods, or effects were received by the said H. C., or by this defendant, which this defendant does not admit), were received by the said H. C., or by this defendant, above six years before this defendant was served with any process of this honorable court, to answer the said bill, or any process whatsoever was sued against this defendant to account for the same; and that if the said plaintiff had any cause of action or suit against this defendant, or against the said H. C. for or concerning any of the said matters, which this defendant does not admit, that such cause of action or suit did not accrue or arise within six years before the said bill was filed, or this defendant served with process; nor did this defendant, or his testator, at any time within six years before the said bill was exhibited, or process sued out against this defendant, promise or agree to come to any account, or to make satisfaction, or to pay any sum or sums of money, for or by reason of any of the said matters; and that by a certain act of ——— for the limitation of actions and suits at law, it was enacted, etc. (*state the statute to be pleaded*), and this defendant pleads the several matters aforesaid in bar to so much of the plaintiff's said demand as aforesaid, and prays the judgment of this honorable court thereon; and this defendant for answer, etc.

**XLI. THAT SUPPOSING THE PLAINTIFF ENTITLED TO THE ASSISTANCE OF THE COURT TO ASSERT A RIGHT, THE DEFENDANT IS EQUALLY ENTITLED TO THE PROTECTION OF THE COURT TO DEFEND HIS POSSESSION.**

**1. *Plea of purchase for a valuable consideration, without notice.***

[*Title and commencement.*]

**As to so much of the said bill as seeks an account of what is**

due and owing to the said complainant, in respect of the annuity of fifty dollars therein mentioned, and stated to be charged upon, and issuing out of the hereditaments and premises therein and hereinafter mentioned, this defendant doth plead thereto, and for plea saith that A. B., previously to and on the —— day of ——, was, or pretended to be seised in fee-simple, and was in, or pretended to be in the actual possession of all those manors, in the said bill particularly mentioned and described, free from all encumbrances whatsoever; and this defendant, believing that the said A. B. was so seised and entitled, and that the said hereditaments and premises were in fact free from all encumbrances, on the —— day of ——, agreed with the said A. B. for the absolute purchase of the fee-simple and inheritance thereof; whereupon certain indentures of lease and release bearing date respectively on, etc., between the said A. B. of the one part, and this defendant of the other part, were duly made and executed; and by the said indenture of release, the said A. B., in consideration of the sum of \$——, paid to him by this defendant, granted, bargained, sold, released, and confirmed unto this defendant, all, etc. (*set out the parcels verbatim from the deed*), to hold unto, and to the use of this defendant, his heirs and assigns, forever; and in the said indenture of release is contained a covenant from the said A. B. with this defendant, that he, the said A. B., was absolutely seised of the said hereditaments and premises, and that the same and each of them and every part thereof were and was free from all encumbrances; as by the said indentures of lease and release respectively, reference being thereunto had, will more fully appear; and this defendant doth aver that the said sum of \$——, the consideration money in the said indenture of release mentioned, was actually paid by this defendant to the said A. B., at the time the said indenture of release bears date; and this defendant doth also aver that at or before the respective times of the execution of the said indentures of lease and release by the said A. B. and this defendant, and of the payment of the said purchase money, he, this defendant, had no notice whatsoever of the said annuity of fifty dollars, now claimed by the said complainant, or of any other encumbrance whatsoever,

that in anywise affected the said hereditaments and premises, so purchased by this defendant as aforesaid, or any of them, or any part thereof; and this defendant insists that he is a *bona fide* purchaser of the said hereditaments and premises for a good and valuable consideration, and without any notice of the said annuity claimed by the complainant; all which matters and things this defendant doth aver and plead in bar to so much of the said complainant's bill as is hereinbefore particularly mentioned; and prays the judgment of this honorable court, whether he should make any further answer to so much of the said bill as is hereinbefore pleaded to; and this defendant, not waiving his said plea, but relying thereon, and for better supporting the same, for answer saith that he had not at any time before, or at the time of purchasing the said hereditaments and premises, or since, until the said complainant's bill was filed, any notice whatsoever, either expressed or implied, of the said annuit, of fifty dollars claimed by the said complainant, or that the same or any other encumbrance whatsoever was charged upon or in anywise affected the said hereditaments and premises so purchased as aforesaid, or any of them, or any part thereof; and this defendant denies, etc.

## XLII. THAT THE BILL IS DEFICIENT TO ANSWER PURPOSES OF COMPLETE JUSTICE.

### 1. *Plea of want of proper parties.*

[*Title and commencement.*]

As to so much of the said complainant's bill as seeks an account from this defendant, as executor and heir at law of H. E., Esq., deceased, in the said bill named, this defendant's late brother, for what remains due and owing upon the bond in the said bill mentioned, bearing date the —— day of ——, in the year ——, and payment by this defendant as such executor and heir at law of the said H. E., deceased, as aforesaid, of what shall be found due on taking such account; this defendant doth plead thereto, and for plea saith, that no part of the sum of \$——, for securing the repayment whereof the said bond was executed, was paid to or received by the said H. E., but

that the whole was paid unto A. W., in the said bond and in the said bill also named, and received by him for his sole use, and that the said H. E. was only surety for the said A. W., and that the said plaintiff afterwards accepted a composition for what he alleged to be due on said bond from the said A. W. without the privity of the said H. E. in his lifetime, or this defendant since the death of the said H. E., which took place on or about the ——— day of ———, as in the said bill mentioned, since which no demand has been made on this defendant for any money alleged to be due on the said bond; and that the said A. W. died several years ago, seised of considerable real estates, and also possessed of a large personal estate, and that his heir at law, or the devisee of his real estate, and also the representative of his personal estate, ought to be, but are not, made parties to the said bill. Therefore, etc.

**XLIII. THAT THE SITUATION OF THE DEFENDANT  
RENDERS IT IMPROPER FOR A COURT OF EQUITY  
TO COMPEL A DISCOVERY.**

1. *Plea that the discovery sought by the bill would betray the confidence reposed in the defendant as an attorney.*<sup>1</sup>

[*Title and commencement.*]

As to so much and such part of the said bill as seeks a discovery from this defendant of the title of W. W., Esq., another defendant in the said bill named, to all or any of the manors, messuages, lands, tenements, or hereditaments, late of C. W., Esq., his late grandfather, deceased, in the said bill also named; this defendant doth plead thereto, and for plea saith, that he, this defendant, is duly admitted and sworn an attorney of the court of great sessions for the several counties of Denbigh, Flint, and Montgomery, in Wales, and also a solicitor of this honorable court, and has for several years past practiced, and now practices, as such; and this defendant was employed by C. W.,

<sup>1</sup> A party will not be compelled to disclose the legal advice given him by his attorney or counsel, nor the facts stated, nor the matter communicated between himself and them in reference to the pending suit, or to the dispute which has resulted in the present litigation; nor, on the other hand, will these professional advisers be compelled or permitted to disclose the matters which they have learned or communicated in the same manner. Pom. Eq. Jur. § 203.

Esq., deceased, the late father of the said other defendant, W. W., in the lifetime of the said C. W., and since his decease hath also been employed in that capacity by the said other defendant, J. W., the mother and guardian of the said W. W., during his minority; and by the said W. W. since he attained his age of twenty-one years; and in that capacity only, or by means of such employment only, hath had the inspection and perusal of any of the title deeds of and belonging to the said estate, or any part or parts thereof, for the use and service of his said clients, and therefore ought not, as this defendant is advised, to be compelled to discover the same. Wherefore, etc.

#### XLIV. PLEAS TO BILLS NOT ORIGINAL.

##### 1. *Plea to a bill of revivor.*

[*Title and commencement.*]

That the said complainant is not, as stated in the said bill of revivor, the personal representative of A. B., deceased, the testator therein named, and as such entitled to revive the said suit in the said bill of revivor mentioned, against this defendant; but the said complainant is the administrator only of C. D., late of, etc., deceased, who died intestate on the ——— day of ——— last, and was the sole executor of the said A. B.; and that letters of administration of the personal estate and effects of the said A. B., unadministered by the said C. D. in his lifetime, have, since the death of the said C. D., been duly granted by the prerogative court of the archbishop of Canterbury, to E. F., of, etc., who thereby became, and now is, the legal personal representative of the said A. B. Wherefore, etc.

##### 2. *Plea to a supplemental bill.*

[*Title and commencement.*]

That the several matters and things in the said complainant's present bill stated and set forth by way of supplement, arose, and were well known to the said complainant, before and at the time the said complainant filed his original bill in this cause; and that such said several matters and things can now be introduced, and ought so to be, if necessary, by amending the said original bill. Wherefore, etc.

## CHAPTER VIII.

## ANSWERS.

## XLV. THE TITLE, COMMENCEMENT AND CONCLUSION.

1. *The title of a defense by answer to a suit in equity.*

The answer of ———, the defendant [*or*, one of the defendants], *or*, the joint and several answers of ———, the defendants [*or*, two of the defendants], to the bill of complaint of ———, plaintiffs.

2. *Where there is only one defendant to an original bill.*

The answer of A. B., defendant to the bill of complaint of C. D., complainant.

3. *By the attorney-general.*

The answer of J. S. C., attorney-general of the State of ———, one of the defendants to the bill of complaint of E. C. and R., his wife (late R. A., spinster), complainants.

4. *By an infant.*

The answer of C. D., an infant under the age of twenty-one years, by L. M., his guardian, defendant [*or*, one of the defendants], to the bill of complaint of A. B., plaintiff.

5. *By husband and wife.*

The joint answer of A. B. and M., his wife, defendants, to the bill of complaint of A. B., the plaintiff.

*or*,

The joint answer of A. B. and C., his wife, the [*or*, two of the] above-named defendants, to the bill, etc. [*or*, *if they were married since she was made a defendant, say*]: The joint answer of A. B. and C., his wife, lately, and in the bill called C. D., spinster [*or*, widow], to the bill, etc.

In answer to the said bill, we, A. B. and C., his wife, say as follows:—

6. *By wife separately under an order.*

The answer of C. B., one of the above-named defendants, and the wife of [the defendant] A. B., to the bill, etc.

In answer to the said bill, I, C. B., answering separately from my husband, in pursuance of an order of this honorable court, dated the \_\_\_\_\_ day of \_\_\_\_\_, 18—, authorizing me so to do, say as follows :—

7. *By a lunatic or idiot, etc.*

The joint answer of E. F., a lunatic [*or, idiot or imbecile person*], by T. P., his guardian *ad litem*, and T. P., committee of the said E. F., defendants, to the bill of complaint of A. B., the plaintiff.

8. *Where the bill misstates the names of defendants.*

The joint and several answer of J. L., in the bill called R. L., and of C. E., in the bill called D. E., defendants, to the bill of complaint of A. B., plaintiff.

9. *The commencement, or introduction of words of course, preceding an answer.*

[*Title.*]

This defendant [*or, these defendants respectively*], now and at all times hereafter saving to himself [*or, themselves*] all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is [*or, these defendants are*] advised, it is material or necessary for him [*or, them*] to make answer to, answering saith [*or, severally answering say*].

10. *Same, by a formal party who is a stranger to the facts.*

[*Title.*]

This defendant, saving and reserving to himself, etc. (*as above*), answers and says, that he is a stranger to all and singular the matters and things in the said plaintiff's bill of complaint contained, and therefore leaves the plaintiff to make such proof thereof as he shall be able to produce; without this, that, etc.



11. *Same, by an infant.*

[Tute.]

This defendant, answering by his said guardian, saith that he is an infant of the age of —— years, or thereabouts, and he therefore submits his rights and interests in the matters in question in this cause to the protection of this honorable court; without this, that, etc.

12. *The conclusion.*

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

XLVI. COMMON FORMS USED IN FRAMING ANSWERS.<sup>1</sup>1. *Accounts; reference to book containing them.*

The dealings and transactions in respect of the said trade are entered in a large book, or ledger, kept on the premises at ——, and the items in respect thereof are contained in one hundred and sixty-four pages, with double columns, of the said book; and to set out such items in detail would occasion very great expense; but we are willing, if the court shall think proper so to direct, that the plaintiff or his solicitor should inspect the said book, and take extracts therefrom, at all reasonable times of the day.

2. *Accounts refused, as being useless before decree.*

And we say and submit, that it would only occasion great and useless expense were we in this our answer to set forth any

1 From Dan. Ch. Pr. \*2119, *et seq.*

further or fuller account of the rents and profits aforesaid; and that the same ought to be taken, if at all, by and under the directions and decree of this honorable court.

### 3. *Admission for purposes of the suit.*<sup>1</sup>

We have no personal knowledge of the fact, but, for the purposes of the suit, we admit that, etc.

or,

And this defendant further answering, saith he hath been informed and believes it to be true that, etc. Or, this defendant admits that, etc.

### 4. *Claims made by defendant.*<sup>2</sup>

I claim to be interested in the matters of this suit, by virtue of, etc.

The short particulars of the mortgage now vested in us, and of our title thereto, are as follows, etc.

We claim to be equitable mortgagees of the hereditaments mentioned in the said bill, together with other hereditaments,

1 The averments of a bill in equity may be considered as established whenever the statements in the answer can, by fair interpretation, be construed into an admission of or acquiescence in them. *Surget v. Byers*, Hempst. (U. S.) 715.

Plaintiff is entitled to a full answer as to every material allegation of his bill. *Price v. Tyson*, 22 Am. Dec. 279. If the answer is silent as to a fact charged to be, or which may fairly be presumed to be within the knowledge of defendant, such fact will be deemed to be admitted. *Moore v. Lockett*, 4 Am. Dec. 683.

No admissions in an answer to a bill in chancery can, under any circumstances, lay a foundation for relief under any specific head of equity, unless the ground be substantially set forth in the bill. *Jackson v. Ashton*, 11 Peters (U. S.) 229.

If the answer of the defendant admits a fact, but insists on a matter by way of avoidance, the complainant need not prove the fact admitted, but the defendant must prove the matter in avoidance. *Clark v. White*, 12 Peters (U. S.) 178; affirming, 5 Cranch C. C. 102.

A denial in an answer in equity that defendant "delivered" an alleged deed goes for nothing if the answer admits facts and circumstances which do in law constitute delivery. *Adams v. Adams*, 21 Wall. (U. S.) 185.

An evasive answer with admitted facts may entitle complainant to the relief prayed for. *Allen v. Elder*, 2 Am. St. Rep. 63.

2 After having answered all the allegations of the bill, defendant may go on and state matters in bar or avoidance of plaintiff's claim, by way of further answer. *Price v. Tyson*, 22 Am. Dec. 279. But if the answer goes out of the bill to state anything not material to the defendant's case, it will be expunged as impertinent. *Price v. Tyson*, 22 Am. Dec. 279.

under a memorandum in the words and figures following; that is to say, etc.

We claim a lien on the shares of, etc., for so much of the said debt as arises from the unpaid purchase money of the same shares respectively, and the interest thereof.

*5. Craving leave for greater certainty.*

We admit that, etc.; or, we believe that, etc.; but, for greater certainty, we crave leave to refer to the said, etc., when produced.

*6. Craving leave to refer to co-defendant's answer.*

I know little or nothing respecting the deeds, dealings, and transactions stated in the said amended bill; but I have seen a copy of the answer proposed to be forthwith put in to the amended bill by the defendants J. L. and G. W. F., and I have no doubt but that the statements contained in such answer are correct. However, for my greater certainty, as to the contents of deeds and other written documents, I crave leave to refer to such deeds or documents. Under the circumstances hereinbefore stated, and to avoid expense, and prolixity, I abstain from answering, categorically, the interrogatories filed for the examination of the last-named defendants and myself in answer to the amended bill; but if the plaintiffs so desire I am ready and willing to put in a full answer to the said amended bill.

*7. Information and belief.*

I have been informed and believe that, etc.

I believe that, etc.

We have no reason to doubt, and therefore we believe that, etc.

We believe that the statements contained in the paragraphs numbered respectively from 1 to 8, both inclusive, of the plaintiff's bill of complaint are true, except in the particulars or respect hereinafter mentioned; that is to say, etc.

I, this defendant, W. R., say, and we, these other defendants, believe it to be true, that, etc.

We have no personal knowledge of the matters inquired after

by the —— interrogatory filed in this cause; but we have no reason to doubt, and therefore we believe, that, etc.

8. *Ignorance.*<sup>1</sup>

I [*or, we*] do not know, and cannot set forth as to my [*or, as to either of our*] belief *or* otherwise, whether or not it is alleged or is the fact that, etc.

9. *Qualified denial.*

Save as herein appears, it is not the fact, etc.

Save as herein appears (*or, save as by the said schedule appears*), I do not know, etc.

10. *Reference to schedule.*

I have in the —— schedule hereto annexed, and which I pray may be taken as part of this my answer, set forth, to the best of my knowledge, information, and belief, a description of, etc.

11. *Release, craving some benefit as if pleaded.*

We submit and humbly insist, that the said release so executed as aforesaid, and the payment of the said sum of \$——, and the receipt given for the same, is a full discharge; and we claim the same benefit as if we had pleaded the same release. Nevertheless, we are willing and hereby submit to account as this honorable court may think fit.

12. *Settled accounts, claim of.*

The account so stated and settled was in fact stated and settled by the said A. B. and myself, as it purports to be, on the day of the date thereof; and I claim the benefit thereof as a settled account.

13. *Submission by trustees to act.*

We submit in all things to act as this honorable court shall

<sup>1</sup> An answer stating that the respondent has no knowledge that the facts are as stated in the bill of complaint, without any answer as to his belief concerning it, is deemed sufficient to prevent the bill from being taken as confessed, as it may be if no answer is filed, in case the complainant does not except to the answer for insufficiency within the period prescribed by rule No. 61. *Brown v. Pierce*, 7 Wall. (U. S.) 205. See *Bradford v. Geiss*, 4 Wash. (U. S.) 513.

direct, and we claim to have our costs, charges, and expenses, properly incurred, paid out of the estate of the said testator.

14. *Traverse.*

The said J. S. died on the —— day of ——, and not on the —— day of ——, as in the second paragraph of the said bill erroneously stated; but save as aforesaid, we do not know, and are unable, as to our belief or otherwise, to set forth whether or not the statements, or some or one or which of the statements contained in the paragraphs numbered respectively 1 to 8, both inclusive, of the plaintiff's bill of complaint, are or is true, or which of them are or is or in what respect untrue, or how otherwise.

15. *Trustee; desire to be discharged.*

I have never in any manner intermeddled with the said trust estate, nor received any of the rents or profits thereof; and I am very desirous to be discharged from the trusts in the bill mentioned, and I am ready and willing to convey and release the trust premises to such persons, or to do such other acts as this honorable court shall direct for this purpose, upon being indemnified in so doing, and having my costs and expenses.

16. *Vexatious suit; settled accounts; claim of benefit of defense as if raised by plea or demurrer.*

We submit to the judgment of this honorable court, and humbly insist that this suit is altogether unnecessary and vexatious; and that even if the plaintiff had been entitled to such relief as is prayed by the said bill, the said relief might have been obtained by proceedings at law; but we say that a large sum of money has been for a long time, and now is, justly due and owing to us from the plaintiff; and that during the whole of the transactions in the said bill mentioned we were in advance with creditors of the plaintiff; and that the plaintiff has repeatedly and partly in the letters hereinbefore set forth acknowledged the accuracy of the accounts rendered by us to him, and has treated the same as being, as in fact they were, settled accounts; and we claim the same benefit from this, our

answer, as if we had pleaded the matters herein stated, or any of them, or as if we had demurred to the said bill.

17. *Want of interest in plaintiff; craving same benefit as if defense by demurrer.*

I am advised, and humbly submit, that the plaintiff has not any interest in the estate of the said testator, or in the matters in question in this suit, nor any such estate or interest in the said testator's estate, or the matters aforesaid, so as to entitle the plaintiff to sustain this suit; and I crave the same benefit from this defense as if I had demurred to the said bill.

18. *Claim of benefit of same defense to amended, as to original bill.*

We submit that the plaintiff has not, by his said amended bill, entitled himself to any equitable relief as against us; and we accordingly claim the benefit of the same objections to the said amended bill which are made by our said answer to the said original bill.

## XLVII. PRECEDENTS OF ANSWERS.

1. *Usual answer of an attorney-general.*

This defendant answering, saith that he is a stranger to the several matters and things in the said complainant's said bill of complaint contained; and this defendant further saith that he claims such rights and interests under, etc. [*the will of R. S., deceased, in the said bill stated*], for and on behalf of the State of ———, as this honorable court shall be of opinion that the said State is justly entitled to.

2. *Answer of the attorney-general, where the plaintiff was alleged to be illegitimate.*

This defendant saving and reserving to himself on behalf of the State of ———, now and at all times, etc., answering, saith that he is a stranger to all and singular the matters and things in the said complainant's bill of complaint contained, and therefore leaves the said complainant to make such proof thereof as he shall be able; and this defendant further an-

swering, saith that he insists on behalf of the State on all such right, title, and interest in the premises in the said bill of complaint mentioned as the said State shall appear to have therein, and this defendant humbly submits the same to the judgment, order, and direction of this honorable court, and also humbly prays that this honorable court will take care of the State's right and interest in the premises. And this defendant denies, etc. Without that, etc. J. M.

3. *Answer of the attorney-general insisting on a title by escheat in the State, in case a testator died without leaving an heir at law, and without having made a will valid to pass real estate.*

This defendant saving, etc., answereth and saith that he is a stranger to all and singular the matters and things in the complainant's said bill of complaint contained, and submitteth the same to the judgment of this honorable court; but insists on the State's behalf that in case it shall appear that D. D., late of, etc., deceased, in the complainant's bill named, died without leaving any person or persons a subject or subjects of the State of ———, his heir or heirs at law, and without having duly made and published his will and testament in the presence of three credible witnesses, and with all the solemnities of law requisite to devise or pass real estate at the time of his being of sound and disposing mind, memory, and understanding, that then and in such case the State is well entitled by escheat to all and singular the freehold messuages, lands, tenements, and hereditaments, of which the said D. D. died seised or entitled in fee-simple; and therefore this defendant prays that this court will take care of such right and interest, if any, as shall appear to be in the State. Without that, etc.

4. *Answer of an executrix submitting to act under the indemnity of the court.*

This defendant, etc., answering saith she admits that S. W., the testator in the said bill named, was at the time of his death possessed of a considerable personal estate, and particularly of the several sums in the public stocks or funds in the said bill

of complaint mentioned ; and that the said testator duly made and published his last will and a codicil thereto, of such respective dates, and to such purport or effect as in the said bill in that behalf stated ; but nevertheless, etc.

*Believes* that the said testator did, soon after making said will and codicil, depart this life, without altering or revoking the said will, save by the said codicil, or without altering or revoking the said codicil, leaving this defendant, his widow, and such other persons as in the said bill in that behalf named, him surviving ;

*Admits* that she hath duly proved the said will and codicil in the proper ecclesiastical court, and hath taken upon herself the execution thereof, and hath by virtue thereof possessed herself of as much of the said testator's personal estate and effects as she has been able to do ; and this defendant denies that she ever threatened to sell or dispose of the said stocks, funds, and annuities in the said will and bill mentioned, without any regard to the interest of the said complainants in remainder therein, or hath made any transfer of the same ;

*Submits* to this honorable court what interest the said complainants are entitled to in the personal estate of the said S. W. by virtue of his said will ;

*Saith* she hath in a schedule, etc., set forth a true and particular account of all the personal estate to which the said testator was entitled at his death, distinguishing what part thereof hath come to her hands, or to the hands of any other person or persons for her use, except such sums as are mentioned in the schedule hereinafter referred to ;

*Saith* she hath in the second schedule, etc., set forth an account current between her and the estate of the said S. W. and this defendant, and hath therein set forth to the best of her knowledge, etc., a full and true account of all sums of money, part of the personal estate of the said testator come to her hands, or to the hands of any person or persons to her use, and of the application thereof ;

*Saith* she is ready and willing to account as this honorable court shall direct, for all such parts of the personal estate of the said testator as have been possessed or received by this de-



fendant, having all just and reasonable allowances made, which she is entitled to as such executrix ; and in all other respects this defendant submits to act as the court shall direct, upon being indemnified and paid her costs of this suit; and denies combination, etc.

5. *Answer of the executors of a deceased acting executor to a bill of revivor ; the defendants not admitting assets, not knowing what was due from their testator to the original testator, but submitting to account.*

These defendants, etc., severally answering say they believe it to be true that at or about the time in the said bill stated, R. W., in the said bill of revivor named, exhibited his original bill of complaint in this honorable court against such parties as defendants thereto as in the said bill mentioned, thereby stating and praying to the effect in the said bill of revivor set forth, so far as the same is therein set forth, and that in consequence of the death of the said R. W., the said complainant T. W., at or about the time in the said bill of revivor mentioned, exhibited his supplemental bill in this honorable court against such parties defendants thereto as therein mentioned, stating and praying to the effect in the said bill of revivor set forth, so far as the same is therein set forth. And that the said several defendants in the said supplemental bill named afterwards appeared and put in their answers thereto, and that such proceedings have since been had in the said cause as in the said bill of revivor mentioned; but for their greater certainty nevertheless these defendants crave leave to refer to the said original and supplemental bills, answers, and other proceedings now remaining filed as of record in this honorable court; and these defendants further severally answering, say they admit it to be true that before any further proceedings were had in the said cause, and at or about the time in the said bill of revivor in that behalf stated, G. R., one of the defendants to the said original and supplemental bills, and one of the executors and trustees under the will of the testator T. W. in the said bill of revivor named, and who hath principally acted in the trusts thereof, departed this life, having first duly made

and published his last will and testament in writing, of such date as in the said bill of revivor mentioned, and thereof appointed these defendants executors; and these defendants admit that since his death they have duly proved his said will in the proper ecclesiastical court, and undertaken the executorship thereof, and are thereby become his legal personal representatives, and that they possessed the said G. R.'s personal estate and effects so far as they have been conveniently able, and these defendants believe (although they do not admit the same) that such personal estate and effects are sufficient to answer whatever might be due from the said G. R. at the time of his death to the estate of the said testator T. W., if anything were so due; but these defendants not knowing the amount thereof are advised that they cannot with safety or propriety admit assets of their said testator to be in their hands sufficient to answer the same, and these defendants say they are ready to account for the said G. R.'s personal estate possessed by them, or for their use, in such manner as the court shall be pleased to direct, if the same should become necessary; and these defendants further severally answering, say they submit that the said suit and proceedings which became abated on the death of the said G. R. may stand and be revived against them as such executors as aforesaid, and be restored to the same plight and condition in which they were at the time of the death of the said G. R.; without that, etc.

6. *Answer of a widow electing to take the bequests made to her by a will, and to release all interest in the devised estates.*

This defendant, etc., answereth and saith she believes it to be true that C. B., deceased, the testator in the said bill of complaint named, being possessed of a large personal estate, did, at or about the time in the said bill of complaint mentioned, duly make and publish his last will and testament in writing, of such purport and effect, and containing such bequest to this defendant as in the said bill of complaint in that behalf set forth, and that the said testator appointed such persons as in the said bill of complaint named executors and executrix of his said will: and this defendant further answering saith, she be-

believes it to be true that the said testator afterwards, and at or about the time in the said bill of complaint mentioned, duly made and published a codicil to his said will in such words and to such purport and effect as in the said bill of complaint also set forth; but for her greater certainty nevertheless as to the said will and codicil, and the respective dates, purports, and contents thereof, this defendant craves leave to refer thereto when produced; and this defendant further answering saith, she admits that the said testator departed this life at or about the time in the said bill of complaint in that behalf mentioned, without having in any manner altered or revoked his said will, save by the said codicil, and without having altered or revoked his said codicil; and that the said complainants have since duly proved the said will and codicil in the proper court, and taken upon themselves the executorship thereof; and this defendant further saith, she claims to be entitled to the benefits intended her by the said testator's will, and is ready upon the same being secured to her according to the directions in the said will contained, to release to J. P., in the said will named, all her right and interest in and to the premises in the said will mentioned, and for that purpose to execute all necessary instruments or deeds; and this defendant denies, etc.

## CHAPTER IX.

REPLICATIONS.<sup>1</sup>**XLVIII. A general replication to a defendant's answer.**

The replication of A. B., complainant, to the answer of C. D., defendant.

This repliant saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or

<sup>1</sup> The answer will be taken as true if no replication is filed (*Trott v. Etnington*, 41 Am. Dec. 326); and no evidence can be given by the complainant to contradict it. (*O'Donoghue v. Roberts*, 1 Wash. (U. S.) 330; *Pierce v. West*, Peters (U. S.) 331.

Under rule No. 40, the complainant must reply to the answer of every defendant, when sufficient, without reference to the state of the cause or of the pleadings as regards any other defendant. The replication must be general or, as rule 40(b) states, special replications. (*Coleman v. Martin*, 6 R. & H. 1, 8 Ex. 20.

Where a complainant, instead of filing the general replication, sets down the cause for hearing upon bill and answer, this is an admission that everything well pleaded in the answer is proved. (*Parton v. Pring*, 2 Pat. Off. Gaz. 619.

Where the statute of limitations is pleaded as a bar, at law or in equity, and the plaintiff desires to bring himself within its savings, he must set forth the facts specially in his replication, or by an amendment of *avoids*, or the existence of the exception, not being an issue between the parties, the court can take no notice of any evidence to establish it. (*Plant v. Vattier*, 9 Peters (U. S.) 405, and note to Banks' ed., affirming 1 McLean (U. S.) 146; *Taylor v. Benham*, 5 How. (U. S.) 223; *S. P.*, *Marsteller v. McClean*, 7 Cranch (U. S.) 184.

A departure in pleading is not allowed in equity. If the answer requires a new case to be made, it cannot be done in the replication, but must be by an amendment of the bill. (*Vattier v. Hinde*, 7 Peters (U. S.) 383, reversing 1 McLean (U. S.) 146.

When a cause is submitted for final decree upon the pleadings and evidence, and it turns out that no replication has been filed to the answer, but that the evidence has been taken as if it had been filed, the court will try the case on its merits, notwithstanding the want of a replication, or will allow one to be filed instantor. (*Jones v. Brittan*, 1 Woods (U. S.) 357.

A decree under rule 34 dismissing the bill because of failure to reply to a plea, or set it down for argument, is not a bar to a subsequent action. (*Keller v. Stolsenback*, 30 Fed. Rep. 47.

effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

**XLIX.** *Recent English form of replication.*

Between A. B.,

*Plaintiff.*

and

C. D., E. F., G. H., etc.,

*Defendants.*

The plaintiff in this cause hereby joins issue with the defendant C. D., and will hear the cause on bill and answer against the defendant E. F. [all the defendants against whom the cause is to be heard on bill and answer], or on the order to take the bill as confessed against the defendant G. H.

## CHAPTER X.

## EXCEPTIONS TO ANSWERS.

L. FOR INSUFFICIENCY.<sup>1</sup>1. *An exception to the answer of several defendants.*

In Chancery.

Between W. W., J. W., and C. L., on behalf of themselves and all other the creditors of J. B., who shall come in and contribute to the expense of this suit, *Complainants.*

and

J. G. and T. B.,

*Defendants.*

An exception taken by the said complainants to the insufficient answer of the said defendants.

For that the said defendants have not, to the best of their knowledge, remembrance, information, and belief, answered and set forth a full, just, and true inventory and account of all and singular the goods and chattels, personal estate and effects whatsoever which J. B., the younger in the said bill named, was possessed of, entitled to, or interested in, at the time of the date of the indenture in the said bill mentioned, and all the particulars whereof the same consisted, and the quantities, qualities, full, real, and true values thereof, and of every such particulars;

<sup>1</sup> It is the special office of an exception, not of a demurrer, to raise the question whether an answer to an interrogatory is sufficient. *Chicago, St. Louis, etc. R. R. Co. v. Macomb*, 2 Fed. Rep. 18. The exceptions should state the charges in the bill, and the interrogatory applicable thereto, to which the answer is addressed, and then the terms of the answer, *verbatim*, so that the court may at once perceive the ground of the exception, and ascertain its insufficiency. *Brooks v. Byam*, 1 Story (U. S.) 236.

It is not matter of exception to an answer that it is silent concerning an immaterial fact, or one which, if admitted, could not tend to support the complainant's equity. *Hardeman v. Harris*, 7 How. (U. S.) 728.

Exceptions for impertinence are only allowed when it is apparent that the matter excepted to is not material or relevant, or is stated with needless prolixity. If it may be material, the exception will not be allowed, as that would leave the defendant without remedy; but the allegation excepted to will be allowed to remain in the answer, and the effect thereof, if found to be true, determined on the final hearing. *Chapman v. School District No. 1, Dedy* (U. S.) 108.

and whether all or some and which of such particulars have not, and when, been possessed or received by, or come to the hands of them, the said defendants, or the one, and which of them, or some, and what person or persons, by their or either of their order, or for their or either of their use, and how, and in what manner, and when and where, and by and to whom, and for how much the same and every or any, and what part thereof hath been sold and disposed of; and whether any, what parts thereof, and to what value or amount now remain undisposed of, and what is become thereof.

In all which particulars the said complainants except to the answer of the said defendants as evasive, imperfect, and insufficient, and humbly pray that the said defendants may be compelled to put in full and sufficient answer thereto.

*2. An exception taken to the answer of a defendant to an amended bill.*

Between A. B.,	and	<i>Complainant.</i>
C. D.,		<i>Defendant.</i>

An exception taken by the said complainant to the insufficient answer of the said defendant to the said complainant's amended bill of complaint.

For that the said defendant hath not, to the best and utmost of his knowledge, remembrance, information, and belief, set forth the documents by which the modus or composition in the said defendant's former answer alleged and insisted upon is made out.

In which particular the said complainant excepts to the answer of the said defendant as evasive, imperfect, and insufficient, and humbly prays that the said defendant may be compelled to put in a full and sufficient answer thereto.

*3. For insufficiency — Modern English form.*

In Chancery.		
Between E. D.,	and	<i>Plaintiff.</i>
J. P.,		<i>Defendant.</i>

Exceptions taken by the above-named plaintiff to the answer of the defendant [*or, if more than one defendant, of the defendant ———*] for insufficiency.

*First exception.*] For that the said defendant has not in and by his said answer, according to the best of his knowledge, remembrance, information, and belief, answered and set forth whether, etc.

*Second exception.*] For that the defendant has not in and by his said answer in manner aforesaid answered and set forth whether, etc.

[*And so with respect to the other exceptions, using the words of the interrogatory not answered.*]

In all or some of which particulars the said plaintiff is advised that the said answer of the defendant is evasive and insufficient, and ought to be amended, and humbly prays the same may be amended accordingly.

[*Counsel's name.*]

# LI. *For scandal.*<sup>1</sup>

In Chancery.

Between E. D.,

*Plaintiff.*

and

J. P.,

*Defendant.*

Exceptions for scandal taken by the above-named defendant A. B. [*or, plaintiff, etc.*] to the bill of complaint of the above-named plaintiff [*or, to the answer of the above-named defendant A. B., to the bill of complaint of the said plaintiff*] filed in this cause on the ——— day of ———.

*Describe the particular passages alleged to be scandalous; as thus:—*

*First exception.*] For that the whole of the paragraph of the

<sup>1</sup> Words, however disparaging or abusive, are not scandalous, unless they are also "impertinent," or, in other words, irrelevant, and put in for the mere purpose of scandal. *Henry v. Henry*, 93 Am. Dec. 87.

All scandalous and impertinent matter in an answer to a bill will be expunged. *Sommers v. Torrey*, 28 Am. Dec. 411. But pertinent matter, though scandalous in itself, is not to be so treated. *Price v. Tyson*, 22 Am. Dec. 279.

What matters may be struck out of an answer as scandalous, immaterial, etc., see *Griswold v. Hill*, 1 Paine (U. S.) 390; *Langdon v. Goddard*, 3 Story (U. S.) 13; *Sargent v. Larned*, 2 Curt. (U. S.) 340.



said bill [or, answer] (*here introduce language to identify the paragraph referred to*) is scandalous.

*Second exception.*] For that the passage commencing with the words, "The said person," in the —— line, and ending with the words "which he knew," in the —— line, of the paragraph of said bill [or, answer] (*identify the paragraph*), is scandalous.

In all which particulars this exceptant excepts to the said bill [or, answer] as scandalous ; and humbly insists that the said scandalous matter be expunged therefrom.

[*Counsel's name.*]

5. *Memorandum that scandal has been expunged.*

Scandal expunged, pursuant to order, dated the —— day of ——,

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